

**BUREAU OF CONSUMER FINANCIAL PROTECTION****12 CFR Part 1024**

[Docket No. CFPB–2021–0006]

RIN 3170–AB07

**Protections for Borrowers Affected by the COVID–19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X****AGENCY:** Bureau of Consumer Financial Protection.**ACTION:** Proposed rule; request for public comment.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) seeks comment on proposed amendments to Regulation X to assist borrowers affected by the COVID–19 emergency. The Bureau is taking this action to help ensure that borrowers affected by the COVID–19 pandemic have an opportunity to be evaluated for loss mitigation before the initiation of foreclosure. The proposed amendments would establish a temporary COVID–19 emergency pre-foreclosure review period until December 31, 2021, for principal residences. In addition, the proposed amendments would temporarily permit mortgage servicers to offer certain loan modifications made available to borrowers experiencing a COVID–19-related hardship based on the evaluation of an incomplete application. The Bureau also proposes certain amendments to the early intervention and reasonable diligence obligations that Regulation X imposes on mortgage servicers.

**DATES:** Comments must be received on or before May 10, 2021.**ADDRESSES:** You may submit comments, identified by Docket No. CFPB–2021–0006, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* 2021-NPRM-COVID-Mortgage-Servicing@cfpb.gov. Include Docket No. CFPB–2021–0006 in the subject line of the message.

- *Hand Delivery/Mail/Courier:* Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID–19 pandemic, the Bureau discourages the submission of comments by hand delivery, mail, or courier.

*Instructions:* The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number for this

rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, and in light of difficulties associated with mail and hand deliveries during the COVID–19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <https://www.regulations.gov>. In addition, once the Bureau’s headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202–435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers, Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** Angela Fox, Shaakira Gold-Ramirez, or Ruth Van Veldhuizen, Counsels; or Brandy Hood or Terry J. Randall, Senior Counsels, Office of Regulations, at 202–435–7700 or <https://reginquiries.consumerfinance.gov/>. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

**SUPPLEMENTARY INFORMATION:****I. Summary of the Proposed Rule**

The Bureau is proposing amendments to Regulation X to assist mortgage borrowers affected by the COVID–19 emergency. As described in more detail in part II, the pandemic has had a devastating economic impact in the United States, making it difficult for some mortgage borrowers to stay current on their mortgage payments. To help struggling borrowers, various Federal and State protections have been established throughout the last 13 months. For example, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),<sup>1</sup> which was signed into law on March 27, 2020, provides up to 360 days of forbearance for mortgage borrowers with federally backed mortgages<sup>2</sup> who request forbearance

<sup>1</sup> The Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, 134 Stat. 281 (2020) (CARES Act).

<sup>2</sup> The CARES Act defines a “federally backed mortgage loan” as any loan which is secured by a first or subordinate lien on residential real property

from their servicer and attest to a financial hardship during the COVID–19 emergency.<sup>3</sup> In addition, in February 2021, the Federal Housing Finance Agency (FHFA), Federal Housing Administration (FHA), Department of Veterans Affairs (VA), or Department of Agriculture (USDA) announced that they were expanding their forbearance programs beyond the minimum required by the CARES Act for a maximum of up to 18 months of forbearance for borrowers who requested additional forbearance by a date certain.<sup>4</sup> Through its mortgage market monitoring, the Bureau understands that servicers of mortgage loans that are not federally backed may be offering similar forbearance programs to borrowers. In addition, FHFA, FHA, USDA, and VA extended Federal foreclosure moratoria until June 30, 2021.<sup>5</sup>

(including individual units of condominiums and cooperatives) designed principally for the occupancy of from one-to-four families that is insured by the Federal Housing Administration under title II of the National Housing Act (12 U.S.C. 1707 *et seq.*); insured under section 255 of the National Housing Act (12 U.S.C. 1715z–20); guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z–13a, 1715z–13b); guaranteed or insured by the Department of Veterans Affairs; guaranteed or insured by the Department of Agriculture; made by the Department of Agriculture; or purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association. CARES Act section 4022(a)(2), 134 Stat. 281, 490.

<sup>3</sup> CARES Act, *supra* note 2, § 4022, at 490–91.

<sup>4</sup> See Press Release, The White House, *Fact Sheet: Biden Administration Announces Extension of COVID–19 Forbearance and Foreclosure Protections for Homeowners* (Feb. 16, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/fact-sheet-biden-administration-announces-extension-of-covid-19-forbearance-and-foreclosure-protections-for-homeowners/>; Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD No. 21–023, *Extensions and expansions support the immediate and ongoing needs of homeowners who are experiencing economic impacts related to the COVID–19 pandemic* (Feb. 16, 2021), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_21\\_023](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_023); News Release, Fed. Hous. Fin. Agency, *FHFA Extends COVID–19 Forbearance Period and Foreclosure and REO Eviction Moratoriums* (Feb. 25, 2021), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-19-Forbearance-Period-and-Foreclosure-and-REO-Eviction-Moratoriums.aspx>; Jason Davis, *VA extends existing moratoriums on evictions and foreclosures and extends loan forbearance opportunities*, Vantage Point: Official Blog of the U.S. Dep’t of Veterans Aff. (Feb. 16, 2021 12:00 p.m.), <https://blogs.va.gov/VAntage/84744/va-extends-existing-moratoriums-evictions-foreclosures-extends-loan-forbearance-opportunities/>; Press Release, U.S. Dep’t of Agric., Release No. 0026.21, *Biden Administration Announces Another Foreclosure Moratorium and Mortgage Forbearance Deadline Extension That Will Bring Relief to Rural Residents* (Feb. 16, 2021), <https://www.usda.gov/media/press-releases/2021/02/16/biden-administration-announces-another-foreclosure-moratorium-and>.

<sup>5</sup> *Id.*

The Bureau is concerned that a potentially unprecedented number of borrowers may exit forbearance at the same time this fall when they reach the maximum term of forbearance. As of January 2021, there were more than 2.1 million borrowers in forbearance programs who were more than 90 days behind on their mortgage payments (including borrowers who have forborne three or more payments) that could still be experiencing severe hardships when their payments are to resume.<sup>6</sup> If borrowers who are currently in an eligible forbearance program request an extension to the maximum time offered by the government agencies, those loans that were placed in a forbearance program early in the pandemic (March and April 2020) will reach the end of their forbearance period in September and October of 2021. Black Knight data suggests there could be an estimated 800,000 borrowers exiting their forbearance programs after 18 months of forborne payments in September and October of 2021.<sup>7</sup> This potentially historically high volume of borrowers exiting forbearance within the same short period of time could strain servicer capacity, potentially resulting in delays or errors in processing loss mitigation requests. Of the borrowers not in a forbearance program, as of January 2021, there were around 242,000 who were 90 days or more delinquent.<sup>8</sup>

Both populations of delinquent borrowers are at heightened risk of referral to foreclosure soon after the foreclosure moratoria end if they cannot bring their loan current or reach a loss mitigation agreement with their servicer to resolve their delinquency and avoid foreclosure. The Bureau is also concerned that a potentially historically high number of borrowers will seek assistance from their servicers at the same time, which could lead to delays and errors as servicers work to process a high volume of loss mitigation inquiries and applications this fall. In addition, the Bureau is concerned that the circumstances facing borrowers due to the COVID-19 emergency, which may involve potential economic hardship, health conditions, and extended periods of forbearance or delinquency, may interfere with some borrowers' ability to obtain and understand important information that the existing rule aims to provide borrowers regarding the

foreclosure avoidance options available to them.

Overall, the proposed amendments aim to encourage borrowers and servicers to work together to facilitate review for foreclosure avoidance options, including to ensure that borrowers have the opportunity to be reviewed for loss mitigation options before a servicer makes the first notice or filing required for foreclosure. The proposed amendments would only apply to mortgage loans secured by the borrower's principal residence. An abandoned property is less likely to be a borrower's principal residence.<sup>9</sup> None of the proposed amendments would apply to small servicers.<sup>10</sup>

In this proposal, the Bureau is focused on both the population of borrowers who are currently delinquent and not in either an active forbearance or an alternative loss mitigation option, and on the large population of borrowers who will be exiting forbearance programs in the next several months. In issuing this proposal, the Bureau recognizes that both the weight of the COVID-19 pandemic and related economic effects have disproportionately fallen upon communities in which many individuals and families were struggling financially even before the pandemic including—Black, Hispanic, Native American, rural, and lower-income communities. For example, the Bureau's analysis of a December 2020 Census pulse survey showed that Black and Hispanic households were more than twice as likely to report being behind on their housing payments as white households.<sup>11</sup>

The proposed amendments to Regulation X would establish a temporary COVID-19 emergency pre-foreclosure review period that would generally prohibit servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until after December 31, 2021. This restriction would be in addition to existing § 1024.41(f)(1)(i), which prohibits a servicer from making the first notice or

filing required by applicable law until a borrower's mortgage loan obligation is more than 120 days delinquent. The Bureau is also seriously considering, and therefore seeking comment on, exemptions from this proposed restriction that would permit servicers to make the first notice or filing before December 31, 2021, if the servicer (1) has completed a loss mitigation review of the borrower and the borrower is not eligible for any non-foreclosure option or (2) has made certain efforts to contact the borrower and the borrower has not responded to the servicer's outreach.

Second, the Bureau proposes to permit servicers to offer certain streamlined loan modification options made available to borrowers with COVID-19-related hardships based on the evaluation of an incomplete application. Eligible loan modifications must satisfy certain criteria that aim to establish sufficient safeguards to ensure that a borrower is not harmed if the borrower chooses to accept an offer of an eligible loan modification instead of completing a loss mitigation application. First, to be eligible, the loan modification must be made available to a borrower experiencing a COVID-19-related hardship. Second, the loan modification may not cause the borrower's monthly required principal and interest payment to increase and may not extend the term of the loan by more than 480 months from the date the loan modification is effective. Third, any amounts that the borrower may delay paying until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures, must not accrue interest. Fourth, the servicer may not charge any fee in connection with the loan modification and must waive all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the loan modification. Finally, the borrower's acceptance of an offer of the loan modification must end any preexisting delinquency on the mortgage loan or the loan modification must be designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification. If the borrower accepts an offer made pursuant to this new exception, the proposal would exclude servicers from certain requirements with regard to any loss mitigation application submitted prior to the loan modification offer, including exercising reasonable diligence to complete the loss mitigation application and sending the

<sup>9</sup> Determining a borrower's principal residence will depend on the specific facts and circumstances regarding the property and applicable State law. For example, a vacant property may still be a borrower's principal residence. An abandoned property, however, might no longer be a borrower's principal residence.

<sup>10</sup> See 12 CFR 1024.30(b)(1); 12 CFR 1026.41(e)(4).

<sup>11</sup> Bureau of Consumer Fin. Prot., *Housing insecurity and the COVID-19 pandemic* at 8 (Mar. 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_Housing\\_insecurity\\_and\\_the\\_COVID-19\\_pandemic.pdf](https://files.consumerfinance.gov/f/documents/cfpb_Housing_insecurity_and_the_COVID-19_pandemic.pdf) (Housing Insecurity Report).

<sup>6</sup> Black Knights Mortg. Monitor, *December 2020 Report* at 5 (Dec. 2020), [https://cdn.blackknightinc.com/wp-content/uploads/2021/01/BKI\\_MM\\_Dec2020\\_Report.pdf](https://cdn.blackknightinc.com/wp-content/uploads/2021/01/BKI_MM_Dec2020_Report.pdf) (Black Dec. 2020 Report).

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.*

acknowledgment notice required by § 1024.41(b)(2). However, the proposal would require servicers to immediately resume reasonable diligence with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the trial loan modification plan if the borrower fails to perform under a trial loan modification plan offered pursuant to the proposed new exception or requests further assistance.

Third, the Bureau proposes amendments to the early intervention and reasonable diligence obligations to ensure that servicers are communicating timely and accurate information to borrowers about their loss mitigation options during the current crisis. Specifically, the Bureau is proposing to amend the early intervention requirements to require servicers to discuss specific additional COVID-19-related information during live contact with borrowers established under existing § 1024.39(a) in two specific circumstances. First, if the borrower is not in a forbearance program at the time the servicer establishes live contact with the borrower pursuant to § 1024.39(a) and the owner or assignee of the borrower's mortgage loan makes a forbearance program available to borrowers experiencing a COVID-19-related hardship, the servicer must ask the borrower whether the borrower is experiencing a COVID-19-related hardship. If the borrower indicates that the borrower is experiencing a COVID-19-related hardship, the servicer must list and briefly describe to the borrower any such payment forbearance programs made available and the actions the borrower must take to be evaluated for such forbearance programs. Second, if the borrower is in a forbearance program made available to borrowers experiencing a COVID-19-related hardship, during the last live contact made pursuant to § 1024.39(a) that occurs prior to the end of the forbearance period, the servicer must provide certain information to the borrower. The servicer must inform the borrower of the date the borrower's current forbearance program ends. In addition, the servicer must provide a list and brief description of each of the types of forbearance extension, repayment options, and other loss mitigation options made available by the owner or assignee of the borrower's mortgage loan to resolve the borrower's delinquency at the end of the forbearance program. Finally, the servicer must inform the borrower of the actions the borrower must take to be evaluated for such loss mitigation

options. The Bureau proposes to include an August 31, 2022 sunset date for the proposed amendments to the early intervention requirements.

In addition, the Bureau proposes to clarify servicers' reasonable diligence obligations when the borrower is in a short-term payment forbearance program made available to a borrower experiencing a COVID-19-related hardship based on the evaluation of an incomplete application. Specifically, the proposed amendment would specify that a servicer must contact the borrower no later than 30 days before the end of the forbearance period to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation. If the borrower requests further assistance, the servicer must exercise reasonable diligence to complete the application before the end of the forbearance program period.

Finally, the Bureau is also proposing to define COVID-19-related emergency to mean a financial hardship due, directly or indirectly, to the COVID-19 emergency as defined in the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)).

The Bureau solicits comment on all aspects of this proposed rule. The Bureau is particularly interested in whether the proposed amendments facilitate efficient and timely pre-foreclosure loss mitigation review without interfering with the housing market in a way that is not proportional to the level of potential borrower harm, including by permitting foreclosure for the disposition of abandoned properties and in other instances where loss mitigation is not possible. In this vein, the Bureau is interested in receiving comments on operational challenges mortgage servicers may experience in implementing the proposal or whether the proposal adequately addresses the risks to borrowers the Bureau has identified. In addition, the Bureau solicits comment generally on whether the proposal would successfully prevent avoidable foreclosures or might lead to other borrower harms. The Bureau also seeks comment on whether the Bureau has accurately identified the risks of borrower harm.

## II. Background

### A. The Bureau's Regulation X Mortgage Servicing Rules

In January 2013, the Bureau issued the Mortgage Servicing Rules to implement the Real Estate Settlement

Procedures Act of 1974 (RESPA),<sup>12</sup> and included these rules in Regulation X.<sup>13</sup> The Bureau later clarified and revised Regulation X's servicing rules through several additional notice-and-comment rulemakings.<sup>14</sup> In part, these rulemakings were intended to address deficiencies in servicers' handling of delinquent borrowers and loss mitigation applications during and after the 2008 financial crisis.<sup>15</sup> When the housing crisis began, servicers were faced with historically high numbers of delinquent mortgages, loan modification requests, and in-process foreclosures in their portfolios.<sup>16</sup> Many servicers lacked the infrastructure, trained staff, controls, and procedures needed to manage effectively the flood of delinquent mortgages they were obligated to

<sup>12</sup> Real Estate Settlement Procedures Act of 1974, Pub. L. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. 2601 *et seq.*).

<sup>13</sup> 78 FR 10695 (Feb. 14, 2013) (2013 RESPA Servicing Final Rule). In February 2013, the Bureau also published separate "Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z)" (2013 TILA Servicing Final Rule). *See* 78 FR 10902 (Feb. 14, 2013). The Bureau conducted an assessment of the RESPA mortgage servicing rule in 2018-19 and released a report detailing its findings in early 2019. Bureau of Consumer Fin. Prot., *2013 RESPA Servicing Rule Assessment Report*, (Jan. 2019), [https://files.consumerfinance.gov/f/documents/cfpb\\_mortgage-servicing-rule-assessment\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-rule-assessment_report.pdf) (Servicing Rule Assessment Report).

<sup>14</sup> Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 FR 44686 (July 24, 2013); Amendments to the 2013 Mortgage Rules under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z), 78 FR 60382 (Oct. 1, 2013); Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 FR 72160 (Oct. 19, 2016) (2016 Mortgage Servicing Final Rule); Amendments to the 2013 Mortgage Rules Under RESPA (Regulation X) and TILA (Regulation Z), 82 FR 30947 (July 5, 2017); Mortgage Servicing Rules Under RESPA (Regulation X), 82 FR 47953 (Oct. 16, 2017). The Bureau also issued notices providing guidance on the Rule and soliciting comment on the Rule. *See, e.g.*, Applicability of Regulation Z's Ability-to-Repay Rule to Certain Situations Involving Successors-in-Interest, 79 FR 41631 (July 17, 2014); Safe Harbors from Liability Under the Fair Debt Collections Practices Act for Certain Actions in Compliance with Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 FR 71977 (Oct. 19, 2016); Policy Guidance on Supervisory and Enforcement Priorities Regarding Early Compliance With the 2016 Amendments to the 2013 Mortgage Servicing Rules Under RESPA (Regulation X) and TILA (Regulation Z), 82 FR 29713 (June 30, 2017).

<sup>15</sup> *See generally* 2013 RESPA Servicing Final Rule, *supra* note 13, at 10699-701.

<sup>16</sup> *See* Servicing Rule Assessment Report, *supra* note 13, at 37-60.

handle.<sup>17</sup> Inadequate staffing and procedures led to a range of reported problems with servicing of delinquent loans, including some servicers misleading borrowers, failing to communicate with borrowers, losing or mishandling borrower-provided documents supporting loan modification requests, and generally providing inadequate service to delinquent borrowers.<sup>18</sup>

The Bureau's mortgage servicing rules address these concerns by establishing procedures that mortgage servicers generally must follow in evaluating loss mitigation applications submitted by mortgage borrowers<sup>19</sup> and requiring certain communication efforts with delinquent borrowers.<sup>20</sup> The mortgage servicing rules also provide certain protections against foreclosure based on the length of the borrower's delinquency and the receipt of a complete loss mitigation application.<sup>21</sup> For example, Regulation X generally prohibits a servicer from making the first notice or filing required for foreclosure until the borrower's mortgage loan is more than 120 days delinquent.<sup>22</sup> These requirements are discussed more fully in the section-by-section analysis in part IV.

The COVID-19 pandemic was declared a national emergency on March 13, 2020, and the emergency declaration was continued in effect on February 24, 2021.<sup>23</sup> As described in more detail below, the pandemic has had a devastating economic impact in the United States. In June of 2020, the Bureau issued an interim final rule (June 2020 IFR) amending Regulation X to provide a temporary exception from certain required loss mitigation procedures for certain loss mitigation options offered to borrowers experiencing a COVID-19-related hardship.<sup>24</sup> The IFR aimed to make it easier for borrowers to transition out of

financial hardship caused by the COVID-19 pandemic and for mortgage servicers to assist those borrowers. With certain exceptions, Regulation X prohibits servicers from offering a loss mitigation option to a borrower based on evaluation of an incomplete application.<sup>25</sup> The June 2020 IFR amended Regulation X to allow servicers to offer certain loss mitigation options to borrowers experiencing financial hardships due, directly or indirectly, to the COVID-19 emergency based on an evaluation of an incomplete loss mitigation application. Eligible loss mitigation options, among other things, must permit borrowers to delay paying certain amounts until the mortgage loan is refinanced, the mortgaged property is sold, the term of the mortgage loan ends, or, for a mortgage insured by the Federal Housing Administration, the mortgage insurance terminates.

#### B. Forbearance Programs Offered Under CARES Act

The CARES Act was signed into law on March 27, 2020, and provides protections for borrowers with federally backed mortgages, which are mortgage loans purchased or securitized by Fannie Mae or Freddie Mac (the GSEs) and loans made, insured, or guaranteed by FHA, VA, or USDA. Under the CARES Act, a borrower with a federally backed loan may request a 180-day forbearance that may be extended for another 180 days at the request of the borrower if the borrower attests to financial hardship during the COVID-19 emergency. The servicer must grant these forbearances.<sup>26</sup>

In February 2021, almost a year into the COVID-19 emergency, FHA, FHFA, USDA, and VA announced that they were expanding their forbearance programs beyond the minimum required by the CARES Act. The agencies noted that the expansion of the forbearance programs was to deliver immediate and continued relief for borrowers affected by the pandemic.<sup>27</sup> The agencies

extended the length of COVID-19 forbearance programs for up to an additional six months for a maximum of up to 18 months of forbearance for borrowers who requested additional forbearance by a date certain.<sup>28</sup> These additional forbearance program extensions may provide assistance to borrowers who need additional time to stabilize their financial situation. In addition to the expansion of the programs, FHA, USDA, and VA extended the period for borrowers to be approved for a COVID-19 forbearance program from their mortgage servicer to June 30, 2021.<sup>29</sup> FHFA has not announced a deadline to request initial forbearance for loans purchased or securitized by the GSEs.<sup>30</sup>

These forbearance programs offered under the CARES Act have assisted borrowers in a meaningful way by providing a lifeline during the economic crisis.<sup>31</sup> Through its mortgage market monitoring, the Bureau understands that servicers of mortgage loans that are not federally backed may be offering similar forbearance programs to borrowers.

*Foreclosure and REO Eviction Moratoriums* (Feb. 25, 2021), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-19-Forbearance-Period-and-Foreclosure-and-REO-Eviction-Moratoriums.aspx>; Jason Davis, *VA extends existing moratoriums on evictions and foreclosures and extends loan forbearance opportunities*, Vantage Point: Official Blog of the U.S. Dep't of Veterans Aff. (Feb. 16, 2021 12:00 p.m.), <https://blogs.va.gov/Vantage/84744/va-extends-existing-moratoriums-foreclosures-extends-loan-forbearance-opportunities/>; Press Release, U.S. Dep't of Agric., Release No. 0026.21, *Biden Administration Announces Another Foreclosure Moratorium and Mortgage Forbearance Deadline Extension That Will Bring Relief to Rural Residents* (Feb. 16, 2021), <https://www.usda.gov/media/press-releases/2021/02/16/biden-administration-announces-another-foreclosure-moratorium-and>.

<sup>26</sup> FHA, VA, and USDA permit borrowers who were in a COVID-19 forbearance program prior to June 30, 2020 to be granted up to two additional three-month payment forbearance programs. FHFA stated that the additional three-month extension allows borrowers to be in forbearance for up to 18 months. Eligibility for the extension is limited to borrowers who are in a COVID-19 forbearance program as of February 28, 2021, and other limits may apply. *Id.*

<sup>29</sup> See *supra* note 27.

<sup>30</sup> News Release, Fed. Hous. Fin. Agency, *FHFA Announces that Enterprises will Purchase Qualified Loans in Forbearance to Keep Lending Flowing* (Apr. 22, 2020), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-that-Enterprises-will-Purchase-Qualified-Loans.aspx>.

<sup>31</sup> JPMorgan Chase & Co. Inst., *Is Mortgage Forbearance Reaching the Right Homeowners during the COVID-19 Pandemic?* (Dec. 2020), <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-covid-mortgage-forbearance-policy-brief-new.pdf>.

<sup>17</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10700.

<sup>18</sup> See U.S. Gov't Accountability Off., *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Actions*, GAO-10-634, at 14-16 (2010), <https://www.gao.gov/assets/310/305891.pdf>; *Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 111th Cong. 54 (2010) (statement of Thomas J. Miller, Att'y Gen. State of Iowa), <https://www.banking.senate.gov/imo/media/doc/MillerTestimony111610.pdf>.

<sup>19</sup> See generally 12 CFR 1024.41. Small servicers, as defined in Regulation Z, 12 CFR 1026.41(e)(4), are generally exempt from these requirements. 12 CFR 1024.30(b)(1).

<sup>20</sup> 12 CFR 1024.39.

<sup>21</sup> 12 CFR 1024.41(f) through (g).

<sup>22</sup> 12 CFR 1024.41(f)(1)(i).

<sup>23</sup> 86 FR 11599 (Feb. 26, 2021).

<sup>24</sup> 85 FR 39055 (June 30, 2020).

<sup>25</sup> See 12 CFR 1024.41(c)(2).

<sup>26</sup> CARES Act, *supra* note 2, § 4022, at 490-91.

<sup>27</sup> See Press Release, The White House, *Fact Sheet: Biden Administration Announces Extension of COVID-19 Forbearance and Foreclosure Protections for Homeowners* (Feb. 16, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/fact-sheet-biden-administration-announces-extension-of-covid-19-forbearance-and-foreclosure-protections-for-homeowners/>; Press Release, U.S. Dep't of Hous. & Urban Dev., HUD No. 21-023, *Extensions and expansions support the immediate and ongoing needs of homeowners who are experiencing economic impacts related to the COVID-19 pandemic* (Feb. 16, 2021), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_21\\_023](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_023); News Release, Fed. Hous. Fin. Agency, *FHFA Extends COVID-19 Forbearance Period and*

*C. Borrowers With Loans in Forbearance Due to the COVID-19 Emergency*

Since the CARES Act was enacted, 6.9 million borrowers have entered a forbearance program.<sup>32</sup> As of February 2021, approximately 2.7 million borrowers remain in active forbearance programs.<sup>33</sup> Of the loans actively in forbearance, 903,000 are owned by the GSEs, 1.26 million are insured by FHA, VA, and 678,000 are held in portfolio or are privately securitized.<sup>34</sup> Of the 1.5 million borrowers who are currently 90 days or more past due on their mortgage payments, more than 98 percent have either received a forbearance on their mortgage loan or are currently actively participating in loss mitigation with their servicer.<sup>35</sup>

Of the 6.9 million borrowers who have entered forbearance programs, approximately 4.2 million borrowers have exited their forbearance program.<sup>36</sup> More than 50 percent of all borrowers who initiated a forbearance program, since the pandemic started, have begun to make their mortgage payments and are repricing under the original terms of their agreement or have paid their mortgage off in full by either refinancing or selling their home.<sup>37</sup> Although market conditions have been favorable for refinancing or selling a borrower's home, it remains uncertain how market conditions will affect a borrower's ability to sell or refinance their home in the future.

The disposition or exit of loans in a COVID-19 forbearance has varied by investor. Of the millions of borrowers who have entered a forbearance program, more than half have since exited.<sup>38</sup> Nearly two-thirds of GSE borrowers have exited their forbearance programs and roughly 60 percent are either now current on their mortgage or have paid off their mortgage in full by either refinancing or selling their home.<sup>39</sup> Although FHA has the highest rate of borrowers in a forbearance program, they also have the lowest portion of borrowers who have exited a forbearance program.<sup>40</sup> Of the FHA loans that entered a forbearance program, 49 percent have exited to

date.<sup>41</sup> In addition, 35 percent of FHA borrowers are repricing and 7 percent have paid off their mortgage.<sup>42</sup> Comparatively, of the loans in forbearance held in private securities or portfolio approximately 50 percent have exited.<sup>43</sup>

Based on informal outreach the Bureau has conducted with servicers since the COVID-19 emergency began, the Bureau understands that payment behavior of borrowers in forbearance programs has changed over time. These changes suggest that borrowers who are in forbearance programs now are borrowers who are experiencing severe or permanent hardships, and it may be more challenging for these borrowers to resume their mortgage payments. Black Knight reports that more than 40 percent of borrowers in forbearance programs continued to make their mortgage payments in the early months of the pandemic.<sup>44</sup> However, as of January 2021, the percent of borrowers making their mortgage payments had fallen to 10 percent.<sup>45</sup> Freddie Mac also examined payment behavior of borrowers in February 2021. Freddie Mac's research revealed that in the first month of forbearance 40 percent of borrowers continued to make their mortgage payment. In the second month, only 24 percent of borrowers made their mortgage payment.<sup>46</sup>

This data is consistent with information that servicers have shared with the Bureau informally. Servicers have indicated that early in the pandemic almost half of borrowers in forbearance programs continued to make their monthly mortgage payments. Some borrowers only missed one or two mortgage payments, which made it possible for those borrowers to make up the missed payments. Other borrowers requested forbearance just in case they became unable to make their mortgage payments, but ultimately continued to make their payments. The Bureau, through its market monitoring, understands that in general, the percent of borrowers making their mortgage payments while in a forbearance program has declined relative to the number of borrowers who remain in forbearance.

Considering that the number of borrowers making payments while in a forbearance program may continue to decline, combined with the large number of mortgages that entered forbearance since the COVID-19 emergency, the Bureau anticipates that most of the borrowers who remain in active forbearance will need to obtain a loss mitigation option, such as repayment plans, payment deferral programs, loan modifications, or short sales, to resolve their delinquency when their forbearance programs come to an end.

Furthermore, because the number of new forbearance requests also continues to decline (as of February 16, 2021, this number had fallen to the lowest post-pandemic rate) the Bureau anticipates that those who entered a forbearance program early in the pandemic and are not making their mortgage payments might struggle the most when the time comes to restart making their payments.<sup>47</sup> The Bureau welcomes comments and information on these trends and on which borrowers might be at highest risk of foreclosure at the end of their forbearance program.

Borrowers who requested forbearance early on in the pandemic have reached a critical milestone. At the end of February 2021, approximately 160,000 borrowers in forbearance programs reached 12 months of forbearance.<sup>48</sup> At the end of March 2021, an estimated additional 600,000 borrowers had been in a forbearance program for 12 months.<sup>49</sup> Another estimated 300,000 or more borrowers will reach the end of their 12 months of forbearance required by the CARES Act at the end of April 2021.<sup>50</sup> The Bureau is not aware of another time when this many mortgage borrowers were in forbearances of such long duration at once, or another time when as many mortgage borrowers were forecast to exit forbearance within a relatively short time frame. This lack of historical precedent creates market uncertainty for the future. The Bureau anticipates that many borrowers who continue to be financially impacted (for example, those who are unemployed or underemployed) will request additional forbearance, as a result of the recently announced government extensions. For borrowers previously employed in the hospitality industry, which has been hit particularly hard, long-term unemployment may further impact their

<sup>32</sup> Black Dec. 2020 Report, *supra* note 6, at 12.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 14.

<sup>36</sup> Black Knights Mortg. Monitor, *January 2021 Report* at 11 (Jan. 2021), [https://cdn.blackknightinc.com/wp-content/uploads/2021/03/BKI\\_MM\\_Jan2021\\_Report.pdf](https://cdn.blackknightinc.com/wp-content/uploads/2021/03/BKI_MM_Jan2021_Report.pdf) (Black Jan. 2021 Report).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.*

<sup>46</sup> Fed. Home Loan Mortg. Corp., *Mortgage Forbearance and Performance during the Early Months of the COVID-19 Pandemic* (Feb. 08, 2021), [http://www.freddiemac.com/research/insight/20210208\\_mortgage\\_forbearance\\_rate\\_during\\_COVID-19.page](http://www.freddiemac.com/research/insight/20210208_mortgage_forbearance_rate_during_COVID-19.page).

<sup>47</sup> Black Jan. 2021 Report, *supra* note 36, at 8.

<sup>48</sup> *Id.* at 7.

<sup>49</sup> *Id.* at 9.

<sup>50</sup> *Id.* at 11.

ability to resume paying their mortgages.<sup>51</sup>

If borrowers who are currently in an eligible forbearance program request an extension to the maximum time offered by the government agencies, those loans that were placed in a forbearance program early in the pandemic (March and April 2020) will reach the end of their forbearance period in September and October of 2021. Black Knight data suggests there could be an estimated 800,000 borrowers exiting their forbearance programs after 18 months of forbearance payments in September and October of 2021.<sup>52</sup> This potentially historically high volume of borrowers exiting forbearance within the same short period of time could strain servicer capacity, potentially resulting in delays or errors in processing loss mitigation requests. It remains unclear how many borrowers in a forbearance program will exit forbearance at 12 months rather than exercising any additional extensions.<sup>53</sup>

Borrowers facing more permanent hardships may need to seek a loss mitigation option when their forbearance program ends to resolve their delinquency.<sup>54</sup> Additionally, borrowers for whom homeownership is no longer sustainable may need additional time to sell their homes.

#### *D. Borrowers With Loans Not in a Forbearance Program*

Even though millions of borrowers have received assistance through forbearance programs, there are still thousands of borrowers who are delinquent or in danger of becoming delinquent and are not in a forbearance program or actively in loss mitigation. As of January 2021, serious delinquencies (90 days or more delinquent) were 5 times their pre-pandemic levels.<sup>55</sup> There were also approximately 207,000 seriously delinquent borrowers who were delinquent before the pandemic started and are not in a forbearance program, and another 35,000 borrowers who became seriously delinquent after the pandemic began and had not entered a forbearance program and were not in

active loss mitigation.<sup>56</sup> As of August 2020, the serious delinquency rate has not been this high since February 2014.<sup>57</sup> This means there is a significant population (an estimated 242,000) of borrowers who were seriously delinquent and could benefit from a forbearance program.

The amendments included in this proposed rule are intended to encourage all borrowers and servicers to work together to facilitate review for foreclosure avoidance options. The Bureau recognizes that the large number of borrowers expected to exit forbearance over the coming months will place significant strain on servicer infrastructure. The proposed amendments allowing streamlined loan modifications based on the evaluation of an incomplete application should facilitate efficient post-forbearance resolutions for many borrowers for whom a payment deferral program does not meet the borrowers' needs. Similarly, the proposals regarding early intervention and reasonable diligence aim to emphasize the importance of servicers conducting outreach to borrowers. The Bureau is proposing the special pre-foreclosure review period as a final backstop to ensure that borrowers affected by COVID-19 emergency have an opportunity to be evaluated for loss mitigation before foreclosure, including, where appropriate, time to sell their homes in an arms' length transaction rather than at a foreclosure sale.

#### *E. Post-Forbearance Options for Borrowers Affected by the COVID-19 Emergency*

Since the beginning of the COVID-19 emergency, servicers have implemented several post-forbearance repayment options and other loss mitigation options to assist borrowers experiencing a COVID-19-related hardship. Many borrowers have been able to benefit from historically low-interest rates and have refinanced their mortgage resulting in a lower mortgage payment. However, access to low interest-rate refinances may be less available for some borrowers.

Borrowers exiting a forbearance program may have several options available depending on their specific financial situation, and the owner, investor, or insurer of their loan. For example, at any point during a forbearance program, a borrower has the

option to reinstate their mortgage by paying all missed mortgage payments at once. After a borrower reinstates their mortgage, the borrower continues to pay their monthly mortgage payment under the original terms of their mortgage loan agreement. Reinstatement may be increasingly difficult for borrowers who did not make any payments during the lengthy forbearances offered to borrowers with COVID-19 related hardships.

Another option for borrowers exiting forbearance programs includes repayment plans. Repayment plans are best suited for borrowers with resolved hardships, who can afford to restart making their full contractual monthly mortgage payments plus an agreed-upon amount of the missed mortgage payments each month until the total missed payment amount is repaid in full. Regulation X generally permits a servicer to offer a short-term repayment plan, as defined in the rule, without evaluating a complete loss mitigation application from the borrower, if certain requirements are met.<sup>58</sup> However, there may be repayment plans that do not meet this definition that may require the borrower to be reviewed based on a complete application.

Servicers have also made available options such as payment deferral programs or partial claims programs to assist in the repayment of delinquent mortgage amounts. The benefit of these programs for borrowers is that they allow the borrower, if financially able, to resume their pre-forbearance mortgage payment and defer any missed payment amounts until the end of the mortgage term without accruing any additional interest or late fees. These programs bring a borrower's mortgage current but are typically only available when other options, such as reinstatement or a repayment plan, are not feasible. The June 2020 IFR provides flexibility for servicers to offer certain deferrals to borrowers based on the evaluation of an incomplete application.<sup>59</sup>

<sup>58</sup> Section 1024.41(c)(2)(iii) defines a repayment plan for purposes of § 1024.41(c)(2) as a loss mitigation option with terms under which a borrower would repay all past due payments over a specified period of time to bring the mortgage loan account current. Comment 41(c)(2)(iii)-4 also defines a short-term repayment plan for purposes of § 1024.41(c)(2)(iii) as a repayment plan allowing for the repayment of no more than three months of past due payments and allowing a borrower to repay the arrearage over a period lasting no more than six months. Short-term repayment plans not meeting this definition would generally require a complete application.

<sup>59</sup> 85 FR 39055 (June 30, 2020) (permitting servicers to offer certain payment deferrals based on the evaluation of an incomplete application).

<sup>51</sup> Neil Paine, *The Industries Hit Hardest By The Unemployment Crisis*, FiveThirtyEight, (May 5, 2020), <https://fivethirtyeight.com/features/the-industries-hit-hardest-by-the-unemployment-crisis/>.

<sup>52</sup> Black Jan. 2021 Report, *supra* note 36, at 9.

<sup>53</sup> *Id.*

<sup>54</sup> Michael Neal, Urban Inst., *Mortgage Market COVID 19 Collaborative: Forbearance and Delinquency Among Agency Mortgage Loans*, (Mar. 19, 2021), <https://www.urban.org/policy-centers/housing-finance-policy-center/projects/mortgage-markets-covid-19-collaborative/covid-19-research-and-data>.

<sup>55</sup> Black Jan. 2021 Report, *supra* note 36, at 4.

<sup>56</sup> Black Dec. 2020 Report, *supra* note 6, at 14.

<sup>57</sup> Molly Boesel, *Loan Performance Insights Report Highlights: November 2020*, Corelogic Insights Blog (Feb. 9, 2021), <https://www.corelogic.com/blog/2021/2/rate-of-new-delinquencies-falls-below-pre-pandemic-levels.aspx>.

Servicers have also made available loan modification options for borrowers. With a loan modification, the borrower's mortgage terms change, such as through extending the number of years to repay the loan, reducing the interest rate, or reducing the principal balance. Loan modifications often lower the borrower's monthly payment to a more affordable amount. The GSEs and FHA permit streamlined application procedures for some loan modifications, such as the GSE Streamlined Flex Modification and FHA's COVID-19 Modification.

If borrowers find themselves unable to stabilize their finances or do not wish to remain in their home, servicers also offer short sales or deed-in-lieu of foreclosure as an alternative to foreclosure.

#### F. Heightened Risk of Foreclosures

The Bureau's mortgage servicing rules generally prohibit servicers from making the first notice or filing required for foreclosure until the borrower's mortgage loan obligation is more than 120 days delinquent.<sup>60</sup> Even where forbearance programs pause or defer payment obligations, they do not necessarily pause delinquency.<sup>61</sup> A borrower's delinquency may begin or continue during a forbearance period if

<sup>60</sup> 12 CFR 1024.41(f). See also 12 CFR 1024.30(c)(2) (limiting the scope of this provision to a mortgage loan secured by a property that is the borrower's principal residence).

<sup>61</sup> For purposes of Regulation X, a preexisting delinquency period could continue or a new delinquency period could begin even during a forbearance program that pauses or defers loan payments if a periodic payment sufficient to cover principal, interest, and, if applicable, escrow is due and unpaid according to the loan contract during the forbearance program. 12 CFR 1024.31 (defining delinquency as the "period of time during which a borrower and a borrower's mortgage loan obligation are delinquent" and stating that "a borrower and a borrower's mortgage obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid.") However, it is important to note that Regulation X's definition of delinquency applies only for purposes of the mortgage servicing rules in Regulation X and is not intended to affect consumer protections under other laws or regulations, such as the Fair Credit Reporting Act (FCRA) and Regulation V. The Bureau clarified this relationship in the Bureau's 2016 Mortgage Servicing Final Rule. 81 FR 72160, 72193 (Oct. 19, 2016). Under the CARES Act amendments to the FCRA, furnishers are required to continue to report certain credit obligations as current if a consumer receives an accommodation and is not required to make payments or makes any payments required pursuant to the accommodation. See Bureau of Consumer Fin. Prot., *Consumer Reporting FAQs Related to the CARES Act and COVID-19 Pandemic*, [https://files.consumerfinance.gov/f/documents/cfpb\\_fcr\\_consumer-reporting-faqs-covid-19\\_2020-06.pdf](https://files.consumerfinance.gov/f/documents/cfpb_fcr_consumer-reporting-faqs-covid-19_2020-06.pdf) (for further guidance on furnishers' obligations under the FCRA related to the COVID-19 pandemic).

a periodic payment sufficient to cover principal, interest, and, if applicable, escrow is due and unpaid during the forbearance. Because the forbearance programs offered during the current crisis generally do not pause delinquency and borrowers may be delinquent for longer than 120 days, it is possible that a servicer may refer the loan to foreclosure soon after a borrower's forbearance program ends unless a foreclosure moratorium or other restriction is in place.

Since the CARES Act took effect in March of 2020, various Federal and State foreclosure moratoria have been established. The Federal foreclosure moratoria stopped new foreclosure actions (except those concerning abandoned properties) and suspended all foreclosure actions in process through a certain date.<sup>62</sup> The moratoria generally do not apply to properties that are considered abandoned under applicable law. The proposed amendments, like the existing foreclosure restrictions in Regulation X, would only apply to mortgage loans secured by the borrower's principal residence. An abandoned property is less likely to be a borrower's principal residence.<sup>63</sup>

FHFA, FHA, VA, and USDA have emergency foreclosure moratoria in effect until June 30, 2021.<sup>64</sup> Most

<sup>62</sup> Ctr. for Disease Control and Prevention, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19* (Feb. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-19/eviction-declaration.html>.

<sup>63</sup> Determining a borrower's principal residence will depend on the specific facts and circumstances regarding the property and applicable State law. For example, a vacant property may still be a borrower's principal residence. An abandoned property, however, might no longer be a borrower's principal residence.

<sup>64</sup> See Press Release, The White House, *Fact Sheet: Biden Administration Announces Extension of COVID-19 Forbearance and Foreclosure Protections for Homeowners* (Feb. 16, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/fact-sheet-biden-administration-announces-extension-of-covid-19-forbearance-and-foreclosure-protections-for-homeowners/>; Press Release, U.S. Dep't of Hous. & Urban Dev., HUD No. 21-023, *Extensions and expansions support the immediate and ongoing needs of homeowners who are experiencing economic impacts related to the COVID-19 pandemic* (Feb. 16, 2021), [https://www.hud.gov/press/releases\\_media\\_advisories/HUD\\_No\\_21\\_023](https://www.hud.gov/press/releases_media_advisories/HUD_No_21_023); News Release, Fed. Hous. Fin. Agency, *FHFA Extends COVID-19 Forbearance Period and Foreclosure and REO Eviction Moratoriums* (Feb. 25, 2021), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-19-Forbearance-Period-and-Foreclosure-and-REO-Eviction-Moratoriums.aspx>; Jason Davis, *VA extends existing moratoriums on evictions and foreclosures and extends loan forbearance opportunities*, Vantage Point: Official Blog of the U.S. Dep't of Veterans Aff. (Feb. 16, 2021 12:00 p.m.), <https://blogs.va.gov/VAntage/84744/va-extends-existing-moratoriums-evictions-foreclosures-extends-loan-forbearance-opportunities/>.

foreclosure proceedings have been halted as a result of the CARES Act and therefore foreclosures are at historic lows.<sup>65</sup> The Bureau is concerned that when the Federal moratoria ends millions of borrowers may be at risk of referral to foreclosure. As of January 2021, there were an estimated 3 million borrowers who were 30 days or more delinquent on their mortgage obligations. Of those, there were more than 2.1 million borrowers in forbearance programs who were more than 90 days behind on their mortgage payments (including borrowers who have forborne three or more payments) that could still be experiencing severe hardships when their payments are to resume.<sup>66</sup> Of the borrowers not in a forbearance program, as of January 2021, there were around 242,000 who were 90 days or more delinquent. Both populations of delinquent borrowers are at heightened risk of referral to foreclosure soon after the foreclosure moratoria end if they do not resolve their delinquency or reach a loss mitigation agreement with their servicer.

The Bureau is focused on minority borrowers who might be at heightened risk of foreclosure resulting in the gaps in the homeownership rates continuing to grow. Homeownership rates vary significantly by race and ethnicity. In 2019, the homeownership rate among white non-Hispanic Americans was approximately 73 percent, compared to 42 percent among Black Americans. The homeownership rate was 47 percent among Hispanic or Latino Americans, 50 percent among American Indians or Alaska Natives, and 57 percent among Asian or Pacific Islander Americans.<sup>67</sup> If minority borrowers are displaced from their homes as a result of foreclosure, it will make homeownership more unattainable in the future, thus widening the divide for this population of borrowers.

*foreclosures—extends-loan-forbearance-opportunities/*; Press Release, U.S. Dep't of Agric., Release No. 0026.21, *Biden Administration Announces Another Foreclosure Moratorium and Mortgage Forbearance Deadline Extension That Will Bring Relief to Rural Residents* (Feb. 16, 2021), <https://www.usda.gov/media/press-releases/2021/02/16/biden-administration-announces-another-foreclosure-moratorium-and>.

<sup>65</sup> ATTOM Data Solutions, *Q3 2020 U.S. Foreclosure Activity Reaches Historical Lows as the Foreclosure Moratorium Stalls Filings* (Oct. 15, 2020), <https://www.attomdata.com/news-market-trends/foreclosures/attom-data-solutions-september-and-q3-2020-u-s-foreclosure-market-report/>.

<sup>66</sup> Black Jan. 2021 Report, *supra* note 36, at 5.

<sup>67</sup> USAFacts, *Homeownership rates show that Black Americans are currently the least likely group to own homes* (Oct. 16, 2020), <https://usafacts.org/articles/homeownership-rates-by-race/>.

ATTOM Data Solutions' 2021 first-quarter analysis found that approximately 175,000 homes secured by mortgages are in some stage of the process of foreclosure.<sup>68</sup> However, with the Federal moratoria in place until June 30, 2021, it is unclear how many of these properties will proceed to foreclosure. The Bureau is proposing amendments that aim to prevent avoidable foreclosures and facilitate review of loss mitigation options. The proposed amendments would only apply to mortgage loans secured by the borrower's principal residence. An abandoned property is less likely to be a borrower's principal residence.<sup>69</sup> The Bureau is also aware of the impact abandoned properties has on communities.<sup>70</sup> That said, of the homes in the foreclosure process, only approximately 3.8 percent are currently abandoned.<sup>71</sup>

### G. The Bureau's COVID-19 Emergency Mortgage Servicing Efforts

In the wake of the COVID-19 pandemic, the Bureau has taken numerous steps to protect and assist mortgage borrowers. Although the below does not describe all the efforts the Bureau has undertaken, it does summarize a few of the Bureau's initiatives since the beginning of the pandemic. The Bureau issued a mortgage servicing-related interagency policy statement and FAQs,<sup>72</sup> various guidance materials, and an Interim Final Rule (IFR) amending Regulation X's loss mitigation rules, as discussed above. The Bureau has engaged in targeted supervisory activity,<sup>73</sup> and has created

<sup>68</sup> ATTOM Data Solutions, *Vacant Zombie Properties Remain Miniscule Factor in U.S. Housing Market Amid Ongoing Foreclosure Moratorium* (Feb. 25, 2021), <https://www.attomdata.com/news/market-trends/attom-data-solutions-q1-2021-vacant-property-and-zombie-foreclosure-report/>.

<sup>69</sup> Determining a borrower's principal residence will depend on the specific facts and circumstances regarding the property and applicable State law. For example, a vacant property may still be a borrower's principal residence. An abandoned property, however, might no longer be a borrower's principal residence.

<sup>70</sup> See *supra* note 68.

<sup>71</sup> *Id.*

<sup>72</sup> Bureau of Consumer Fin. Prot., *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act* (Apr. 3, 2020), [https://files.consumerfinance.gov/f/documents/cfpb\\_intagency-statement\\_mortgage-servicing-rules-covid-19.pdf](https://files.consumerfinance.gov/f/documents/cfpb_intagency-statement_mortgage-servicing-rules-covid-19.pdf); Bureau of Consumer Fin. Prot., *Bureau's Mortgage Servicing Rules FAQs related to the COVID-19 Emergency* (Apr. 3, 2020), [https://files.consumerfinance.gov/f/documents/cfpb\\_mortgage-servicing-rules-covid-19\\_faqs.pdf](https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-rules-covid-19_faqs.pdf).

<sup>73</sup> Bureau of Consumer Fin. Prot., *Supervisory Highlights COVID-19 Prioritized Assessments Special Edition*, Issue 23, (January 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_supervisory-highlights\\_issue-23\\_2021-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf).

and disseminated consumer education resources in coordination with HUD, FHA, FHFA, USDA, and VA.<sup>74</sup> Among other things, these actions by the Bureau serve to encourage servicers to work with borrowers during the pandemic, educate homeowners about their options, and ensure that mortgage servicers have the operational capacity to assist them. In addition, the Bureau recently released guidance announcing the Bureau's supervision and enforcement priorities regarding housing insecurity.<sup>75</sup>

This proposed rule aims to complement these and the other strategic efforts the Bureau has initiated since the onset of the pandemic to assist struggling borrowers and to protect those most vulnerable.

### III. Legal Authority

The Bureau is issuing this proposed rule pursuant to its authority under RESPA and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>76</sup> including the authorities, discussed below. The Bureau is issuing this proposed rule in reliance on the same authority relied on in adopting the relevant provisions of the 2013 RESPA Servicing Final Rule,<sup>77</sup> as discussed in detail in the Legal Authority and Section-by-Section Analysis of the 2013 RESPA Servicing Final Rule.

#### A. RESPA

Section 19(a) of RESPA, 12 U.S.C. 2617(a), authorizes the Bureau to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of RESPA, which include its consumer protection purposes. In addition, section 6(j)(3) of RESPA, 12 U.S.C. 2605(j)(3), authorizes the Bureau to establish any requirements necessary to carry out section 6 of RESPA, section 6(k)(1)(E) of

<sup>74</sup> See, e.g., News Release, Fed. Hous. Fin. Agency, *CFPB, FHFA, & HUD Launch Joint Mortgage and Housing Assistance website for Americans Impacted by COVID-19* (May 12, 2020), <https://www.fhfa.gov/Media/PublicAffairs/Pages/CFPB-FHFA-HUD-Launch-Joint-Mortgage-and-Housing-Assistance-website-for-Americans-Impacted-by-COVID-19.aspx>.

<sup>75</sup> Bureau of Consumer Fin. Prot., *Supervision and Enforcement Priorities Regarding Housing Insecurity* (Apr. 1, 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_bulletin-2021-02\\_supervision-and-enforcement-priorities-regarding-housing\\_WHcae8E.pdf](https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2021-02_supervision-and-enforcement-priorities-regarding-housing_WHcae8E.pdf) (Supervision & Enforcement Housing Report).

<sup>76</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>77</sup> 2013 RESPA Servicing Final Rule, *supra* note 13.

RESPA, and 12 U.S.C. 2605(k)(1)(E) and authorizes the Bureau to prescribe regulations that are appropriate to carry out RESPA's consumer protection purposes. The consumer protection purposes of RESPA include ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers prevent avoidable costs and fees, and facilitating review for foreclosure avoidance options. The amendments to Regulation X in this notice of proposed rule are intended to achieve some or all these purposes.

Specifically, and as described below, during the COVID pandemic, borrowers have faced unique circumstances including potential economic hardship, health conditions, and extended periods of forbearance. Because of these unique circumstances, the procedural safeguards under the 2013 RESPA Servicing Final Rule and subsequent amendments to date, may not have been sufficient to facilitate review for foreclosure avoidance. Specifically, the Bureau is concerned that the present circumstances may interfere with these borrowers' ability to obtain and understand important information that the existing rule aims to provide borrowers regarding the foreclosure avoidance options available to them. As a result, the Bureau believes that a substantial number of borrowers will not have had a meaningful opportunity to pursue foreclosure avoidance options before exiting their forbearance or the end of current foreclosure moratoria.

The Bureau is also concerned that based on the unique circumstances described above, there exists a significant risk of a large number of potential borrowers seeking foreclosure avoidance options in a relatively short time period and that such a large wave of borrowers could overwhelm servicers, potentially straining servicer capacity and resulting in delays or errors in processing loss mitigation requests. These strains on servicer capacity coupled with potential fiduciary obligations to foreclose could result in some servicer liability for failing to meet required timeline and accuracy obligations as well as other obligations under the existing rule with resulting harm to borrowers.

In light of these unique circumstances, the Bureau's interventions are designed to provide advance notice to borrowers about foreclosure avoidance options and forbearance termination dates, as well as to extend the pre-foreclosure review period. The interventions aim to help borrowers understand their options and



encourage them to seek available loss mitigation options at the appropriate time while also allowing sufficient time for servicers to conduct a meaningful review of borrowers for such options in the present circumstances that the existing rules were not designed to address.

#### B. Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act, 12 U.S.C. 5512(b)(1), authorizes the Bureau to prescribe rules “as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.” RESPA is a Federal consumer financial law.

The authority granted to the Bureau in Dodd-Frank Act section 1032(a) is broad and empowers the Bureau to prescribe rules regarding the disclosure of the “features” of consumer financial protection products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to Dodd-Frank Act section 1032, the Bureau “shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.” 12 U.S.C. 5532(c). The Bureau requests any such available evidence.<sup>78</sup> The Bureau also requests

<sup>78</sup> The Bureau is unaware of research that explicitly investigates the link between COVID-19-related stress and comprehension of information about forbearance and foreclosure. However, previous research demonstrates that prolonged or excessive stress can impair decision-making and may be associated with reduced cognitive control, leading to more impulsive and riskier decision-making, including in financial contexts. See, e.g., Katrin Starcke & Matthias Brand, *Effects of stress on decisions under uncertainty: A meta-analysis*, 142 *Psychol. Bulletin* 909 (2016), <https://doi.org/10.1037/bul0000060>. Further, research has shown that thinking that one is or could get seriously ill can lead to stress that negatively affects consumer decision-making. See, e.g., Barbara Kahn & Mary Frances Luce, *Understanding high-stakes consumer decisions: Mammography adherence following false-alarm test results*, 22 *Marketing Sci.* 393 (2003), <https://doi.org/10.1287/mksc.22.3.393.17737>. Additionally, research conducted in the last year has identified substantial variability in 1) COVID-19-related anxiety and traumatic stress, which has been linked to consumer behavior including panic-buying; and 2) perceived threats to physical and psychological well-being. See, e.g., Steven Taylor *et al.*, *COVID stress syndrome: Concept, structure, and correlates*, 37 *Depression & Anxiety* 706 (2020), <https://doi.org/10.1002/da.23071>; Frank Kachanoff *et al.*, *Measuring realistic and symbolic threats of COVID-*

comment on any sources that the Bureau should consider in determining whether to finalize this proposal under section 1032(a).

In addition, section 1032(a) of the Dodd-Frank Act authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

#### IV. Section-by-Section Analysis

##### Section 1024.31 Definitions

##### COVID-19 Related Hardship

For clarity and ease of reference, the Bureau is proposing to define a new term, “a COVID-19-related hardship,” for purposes of subpart C. The proposal would define COVID-19-related hardship to mean a financial hardship due, directly or indirectly, to the COVID-19 emergency as defined in the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)). The proposed amendments to the early intervention requirements in § 1024.39 and the loss mitigation requirements in § 1024.41 use this new term. The Bureau solicits comment on this proposed definition.

##### Section 1024.39 Early Intervention

##### 39(a) Live Contact

As discussed below in the section-by-section analysis of proposed § 1024.39(e), the Bureau is proposing to add temporary additional early intervention live contact requirements during the COVID-19 emergency. The Bureau is proposing conforming amendments to revise § 1024.39(a) and related commentary<sup>79</sup> to incorporate a reference to proposed § 1024.39(e).

*19 and their unique impacts on well-being and adherence to public health behaviors*, *Soc. Psychol. & Personality Sci.* 1 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/1948550620931634>. Taken together, the available evidence suggests that experiencing heightened stress and anxiety can impair decision-making in financial contexts, and this association may be particularly strong during the COVID-19 pandemic.

<sup>79</sup> When amending commentary, the Office of the Federal Register requires reprinting of certain subsections being amended in their entirety rather than providing more targeted amendatory instructions and related text. The sections of commentary text included in this document show the language of those sections with the changes as adopted in this final rule. In addition, the Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes this final rule makes to the regulatory and commentary text of Regulation X. This redline is

##### 39(e) Temporary COVID-19-Related Live Contact

The Bureau is proposing to add § 1024.39(e) to require temporary additional actions in certain circumstances when a servicer establishes live contact with a borrower during the COVID-19 emergency. Currently, a servicer is required to make good faith efforts to establish live contact with delinquent borrowers no later than the borrower’s 36th day of delinquency and again no later than 36 days after each payment due date so long as the borrower remains delinquent.<sup>80</sup> Promptly after establishing live contact, the servicer must inform the borrower of loss mitigation options that are available to the borrower, as applicable.<sup>81</sup> The servicer has the discretion to determine whether it is appropriate to inform the borrower of loss mitigation options.<sup>82</sup> If the servicer determines it is appropriate, the servicer need not notify borrowers of specific loss mitigation options, but rather may provide a general statement that loss mitigation options may apply.<sup>83</sup> The servicer is not required to establish or make good faith efforts to establish live contact with the borrower if the servicer has already established and is maintaining ongoing contact with the borrower under the loss mitigation procedures under § 1024.41.<sup>84</sup>

Proposed § 1024.39(e) would temporarily require servicers to take additional actions during live contacts established under existing § 1024.39(a) requirements for one year after the effective date of the final rule. In general, proposed § 1024.39(e)(1) would require servicers to ask whether borrowers who are not in a forbearance program at the time of the live contact are experiencing a COVID-19-related hardship and, if so, to list and briefly describe available forbearance programs to those borrowers and the actions a borrower must take to be evaluated. In general, proposed § 1024.39(e)(2) would require that, for borrowers who are in a forbearance program at the time of live contact, during the last required live contact made prior to the end of the forbearance period servicers must

posted on the Bureau’s website with the proposed rule. If any conflicts exist between the redline and the text of Regulation X or this final rule, the documents published in the **Federal Register** and the Code of Federal Regulations are the controlling documents.

<sup>80</sup> Small servicers, as defined in Regulation Z, 12 CFR 1026.41(e)(4), are not subject to these requirements. 12 CFR 1024.30(b)(1).

<sup>81</sup> 12 CFR 1024.39(a).

<sup>82</sup> 12 CFR 1024.39(a); Comment 39(a)-4.i.

<sup>83</sup> 12 CFR 1024.39(a); Comment 39(a)-4.ii.

<sup>84</sup> 12 CFR 1024.39(a); Comment 39(a)-6.

provide specific information about the borrower's current forbearance program and list and briefly describe available post-forbearance loss mitigation options and the actions a borrower must take to be evaluated for such options.

The Bureau believes the current crisis has resulted in temporary difficulties for borrowers, both financially and in their ability to obtain and understand necessary loss mitigation information, that may warrant expanding existing § 1024.39(a) live contact early intervention communication requirements during this time. As discussed in part II, the Bureau understands that servicers are generally making loss mitigation options available to borrowers experiencing COVID-19-related hardships to help them avoid foreclosure, including CARES Act and investor-provided forbearance programs, investor-provided payment deferral programs, and the GSEs' flex modification programs. However, the Bureau is concerned that currently, not all borrowers who are eligible for these options are taking advantage of them. In addition, for those borrowers who were able to take advantage of forbearance options, the Bureau is concerned that borrowers may largely exit those forbearance programs around the same time and are not properly prepared to pursue post-forbearance loss mitigation options, if needed. Given the large volume of borrowers in this population, the crisis seems to call for additional action to further encourage borrowers to pursue all loss mitigation options as early as possible, and also to encourage borrowers to pursue post-forbearance loss mitigation options so that there is sufficient time and servicer capacity to complete a loss mitigation review before the servicer initiates foreclosure.<sup>85</sup> As explained below, the Bureau aims to ensure that these borrowers are provided a meaningful opportunity to be assessed for foreclosure avoidance and concludes the proposed interventions would help by facilitating the provision of timely information to borrowers about foreclosure avoidance options before forbearance program options expire and at a time that could help encourage borrowers currently in forbearance to seek loss mitigation assistance early.

As discussed above in part II, as a result of the current crisis, in December 2020, over 3 million borrowers were 30 or more days delinquent on their mortgage payments, with more than half of those borrowers seriously delinquent, putting them at heightened risk of potential foreclosure initiation,

especially once Federal and State foreclosure moratoria end.<sup>86</sup> Of those borrowers, almost 800,000, including almost 250,000 that were seriously delinquent, had not accepted any forbearance program assistance.<sup>87</sup> These borrowers may miss the opportunity to take advantage of forbearance program assistance or other loss mitigation options before the expiration of many of the COVID-19-related programs. Of the remaining borrowers, approximately 2.74 million were in a forbearance program, with most in forbearance programs 12 months or longer. Those borrowers may or may not be able to obtain a workable repayment option or other loss mitigation option to manage the forbore payments by the time their forbearance program ends. Both categories of borrowers face a serious risk of foreclosure.

For those borrowers who have not accepted any forbearance program assistance, consumer advocacy organizations, industry surveys, and other sources have suggested that many of these delinquent borrowers are unaware of the forbearance program options available to them.<sup>88</sup> Additionally, the Bureau is concerned about reports, including findings discussed in the Bureau's 2021 COVID-19 Prioritized Assessments Special Edition of Supervisory Highlights, that some servicers may be providing borrowers with inconsistent or inaccurate information about forbearance programs, inhibiting borrowers' ability to take advantage of available COVID-19-related assistance, including forbearance program assistance.<sup>89</sup> For borrowers who did

<sup>86</sup> Housing Insecurity Report, *supra* note 11, at 6 (citing Black Dec. 2020 Report, *supra* note 6).

<sup>87</sup> Black Dec. 2020 Report, *supra* note 6, at 14.

<sup>88</sup> Letter from the Nat'l Consumer Law Ctr. *et al.*, to David Uejio, Acting Director of the Bureau of Consumer Fin. Prot., (Jan. 28, 2021), [https://www.nclc.org/images/pdf/special\\_projects/covid-19/CFPB\\_Covid\\_Foreclosure\\_Wave.pdf](https://www.nclc.org/images/pdf/special_projects/covid-19/CFPB_Covid_Foreclosure_Wave.pdf) (group letter to CFPB urging prevention of Covid-19 related foreclosures); Letter from Senator Sherrod Brown *et al.*, to Hon. Kathleen Kraninger, Director of the Bureau of Consumer Fin. Prot., (Sept. 2, 2020), <https://www.brown.senate.gov/imo/media/doc/09.02.2020%20Letter%20to%20CFPB%20on%20Forbearance%20Relief%20Awareness.pdf> (citing Jung Hyun Choi & Daniel Pang, *Six Facts You Should Know about Current Mortgage Forbearances*, Urban Institute, Urban Wire: Housing and Housing Finance Blog, (Aug. 18, 2020), <https://www.urban.org/urban-wire/six-facts-you-should-know-about-current-mortgage-forgiveness>; Douglass Duncan, *COVID-19: The Need for Consumer Outreach and Home Purchase/Financing Digitization—National Housing Survey*, Fed. Nat'l Mortg. Ass'n, Perspectives Blog (Aug. 12, 2020), <https://www.fanniemae.com/research-and-insights/perspectives/covid-19-need-consumer-outreach-and-home-purchase-financing-digitization>).

<sup>89</sup> Bureau of Consumer Fin. Prot., *Supervisory Highlights COVID-19 Prioritized Assessments*

enter into forbearance programs during the COVID-19 pandemic, sources also indicate that some either lack information about available post-forbearance loss mitigation options or received inaccurate information about the post-forbearance effects on their mortgage.<sup>90</sup>

The Bureau is concerned that the present unique circumstances of the COVID-19 emergency may have interfered with or may continue to interfere with some borrowers' ability to obtain and understand the important information servicers are required to provide under existing rules regarding foreclosure avoidance options. The lack of information may prevent some borrowers from understanding the potential urgency and need for foreclosure avoidance options for their loan, particularly once the forbearance program ends. These borrowers may not understand their loan's heightened risk for foreclosure initiation, a risk that is even greater for borrowers with longer forbearance periods prevalent in the COVID-19 emergency, as discussed more fully in part II. Even if borrowers received accurate information about the risk of foreclosure and the availability of foreclosure avoidance options, the Bureau is concerned that borrowers may still not fully understand the urgency. The Bureau believes that because there are foreclosure moratoria in place that have been extended multiple times, and because investors are offering multiple forbearance extensions, borrowers in the

*Special Edition*, Issue 23, (Jan. 2021), [https://files.consumerfinance.gov/f/documents/cfpb-supervisory-highlights\\_issue-23\\_2021-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb-supervisory-highlights_issue-23_2021-01.pdf); Letter from Senator Sherrod Brown *et al.*, to Hon. Kathleen Kraninger, Director of the Bureau of Consumer Fin. Prot., (Sept. 2, 2020), <https://www.brown.senate.gov/imo/media/doc/09.02.2020%20Letter%20to%20CFPB%20on%20Forbearance%20Relief%20Awareness.pdf>. ("These findings echoed a report from the Office of the Inspector General at HUD, which found that servicer web pages focused on forbearance 'provided incomplete, inconsistent, dated, and unclear guidance to borrowers related to their forbearance options under the CARES Act.' Similarly, under a separate review, the FHFA Inspector General found 'incomplete and/or unclear information about forbearance and repayment on 14 of the 20 websites of the large servicers and generally limited to no information on forbearance and repayment on the remaining 40 websites,' of medium and small servicers.") (citing Fed. Hous. Fin. Agency, Off. of Inspector Gen., *Some Mortgage Loan Servicers' Websites Offer Information about CARES Act Loan Forbearance That Is Incomplete, Inconsistent, Dated, and Unclear* (Apr. 27, 2020), <https://www.hudog.gov/reports-publications/topic-brief/some-mortgage-loan-servicers-websites-offer-information-about>; Fed. Hous. Fin. Agency, Off. of Inspector Gen., *Oversight by Fannie Mae and Freddie Mac of Compliance with Forbearance Requirements Under the CARES Act and Implementing Guidance by Mortgage Servicers* (July 27, 2020), <https://www.fhfaog.gov/sites/default/files/OIG-2020-004.pdf>).

<sup>90</sup> *Id.*

<sup>85</sup> Black Jan. 2021 Report, *supra* note 36, at 9.

current crisis may not correctly anticipate the end-date to these benefits and thus, may not fully understand the urgency related to their foreclosure risk. The Bureau believes providing borrowers certain additional information about foreclosure avoidance options during live contact may help borrowers better understand the options available and understand the urgency to develop a foreclosure avoidance plan.

The Bureau also notes that the current crisis is predicted to result in an unprecedented volume of loans exiting forbearance programs at relatively the same time, and that a large percentage of those borrowers likely will need post-forbearance loss mitigation upon exiting. Such a wave of loans exiting forbearance programs may create a heightened risk of delays or inadvertent errors that could result in avoidable foreclosure initiations and fees. For example, misplaced borrower applications, failure to correctly identify completed loss mitigation applications, or errors in the review of supporting documentation could result in unnecessary delays in the loss mitigation process that may, erroneously and in violation of the existing regulation, result in non-compliant foreclosure initiations or illegal foreclosure completions. For borrowers currently in forbearance, the Bureau believes providing borrowers additional information about loss mitigation options before the end of the borrower's forbearance program may help to encourage borrowers to apply for those options before their forbearance ends.

Accordingly, the Bureau is proposing § 1024.39(e), discussed below, to require servicers to provide specific additional information to delinquent borrowers with a COVID-19-related hardship promptly after establishing live contact. The proposed requirements would apply for one year from the effective date of the final rule. The proposed additional information that servicers would provide is dependent on whether the borrower is or is not in a forbearance program at the time the live contact is established. As discussed in more detail below, proposed § 1024.39(e)(1) generally would require servicers to list and briefly describe certain available forbearance programs to delinquent borrowers experiencing a COVID-19-related hardship but who are not yet in a forbearance program at the time live contact is established, as well as the actions a borrower must take to be evaluated for such programs. For delinquent borrowers who are in a forbearance program at the time live contact is established, proposed

§ 1024.39(e)(2) generally would require servicers to provide specific information about the borrower's current forbearance program and list and briefly describe certain available post-forbearance loss mitigation options and the actions a borrower must take to be evaluated for such programs. Servicers would be required to provide this information to the borrower during the last required live contact before the end of the forbearance period.

Proposed § 1024.39(e) would be a temporary requirement in place for one year after the effective date of the final rule. The Bureau is not persuaded that this provision will be needed in perpetuity, given that the genesis and necessity arise from the current crisis, which is temporary.

The Bureau notes that proposed § 1024.39(e) would not require additional good faith efforts to establish live contact beyond those required by existing § 1024.39(a). Instead, the proposal specifies additional information that servicers would need to provide during live contacts established under existing § 1024.39(a) requirements. Proposed § 1024.39(e) change the timing requirements or exceptions for existing § 1024.39(a).

Additionally, as is the case with the existing regulation, proposed § 1024.39(e) would not require a servicer to make good faith efforts to establish live contact with a borrower when the servicer has established and is maintaining ongoing contact with a borrower under the loss mitigation procedures under existing § 1024.41, including during the borrower's completion of a loss mitigation application or the servicer's evaluation of the borrower's complete loss mitigation application, or if the servicer has sent the borrower a notice pursuant to existing § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation options.<sup>91</sup> Because the Bureau is proposing conforming amendments to § 1024.39(a), in the circumstances described the servicer would be deemed compliant with the proposed § 1024.39(e), in addition to the current § 1024.39(a).

As discussed above, promptly after establishing live contact with a borrower, a servicer currently has discretion to determine whether it is appropriate to inform the borrower of loss mitigation options.<sup>92</sup> In certain circumstances, the proposed amendments would eliminate that discretion. Proposed § 1024.39(e) would require servicers to provide specific

information about certain available loss mitigation options and application procedures to borrowers in the circumstances described in proposed § 1024.39(e)(1) and (e)(2).

The Bureau is seeking comment on all aspects of proposed § 1024.39(e), including proposed § 1024.39(e)(1) and (e)(2) discussed below. Specifically, the Bureau seeks comment on whether proposed § 1024.39(e) should apply even in instances where the servicer has already established and is maintaining ongoing contact with a borrower pursuant to the loss mitigation procedures in § 1024.41, as discussed in existing comment 39(a)-6. The Bureau believes it may be redundant to require the servicer to provide the information required in proposed § 1024.39(e) when the servicer has established ongoing contact as described in existing comment 39(a)-6, but seeks comment on whether there is some additional benefit to borrowers specific to the COVID-19 emergency that may be missed if finalized as proposed.

The Bureau is also seeking comment on whether the one-year sunset date for proposed § 1024.39(e) would provide enough time to sufficiently reach enough borrowers experiencing a COVID-19-related hardship. In proposing this date, the Bureau considered whether borrowers may continue to benefit from this information for more than a year after the proposed effective date of the final rule. The Bureau considered tying the sunset date of this provision to Federal foreclosure moratoria end-dates or to the COVID-19-related forbearance program end-dates, but is concerned that those periods may be too short or uncertain to ensure that borrowers who may face extended economic or health hardships have the necessary time to discuss foreclosure avoidance options with servicers, as discussed above. The Bureau seeks comment on whether those or other alternative sunset dates would be more appropriate for proposed § 1024.39(e). The Bureau also seeks comment on whether a date-certain sunset poses significant implementation challenges.

39(e)(1)

Proposed § 1024.39(e)(1) would temporarily require servicers to take certain actions promptly after establishing live contact with borrowers who are not currently in a forbearance program where the owner or assignee of the borrower's mortgage loan makes a payment to forbearance program available to borrowers experiencing a COVID-19-related hardship. In those circumstances, proposed § 1024.39(e)(1)

<sup>91</sup> Comment 39(a)-6.

<sup>92</sup> 12 CFR 1024.39(a); Comment 39(a)-4.i.

would require that the servicer ask if the borrower is experiencing a COVID-19-related hardship. If the borrower indicates they are experiencing a COVID-19-related hardship, proposed § 1024.39(e)(1) would require the servicer to provide the borrower a list and description of forbearance programs available to borrowers experiencing COVID-19-related hardships and the actions the borrower must take to be evaluated for such forbearance programs.

As discussed above, approximately 800,000 borrowers are currently delinquent but have not accepted forbearance program assistance during the current crisis. As discussed above, there is concern that this population of borrowers is unaware of the forbearance program options available. It is possible that during the current crisis, even if borrowers are aware of the options available, some borrowers may be uncertain as to how to access the assistance or may even mistrust the servicer's ability to provide the assistance to them. The Bureau explained in the 2013 RESPA Servicing Final Rule that it added early intervention live contact requirements because delinquent borrowers may not make contact with servicers to discuss their options for these very reasons.<sup>93</sup> The Bureau is concerned that the current crisis is exacerbating that lack of awareness and inability to access information because of the speed at which new loss mitigation options may become available and potential crisis-related limitations on certain forms of communication, such as in-person meetings and call-center availability due to limitations on staffing. The present unique circumstances described above may have interfered or may be interfering with some borrowers' abilities to obtain and understand the

important information that the existing rules aim to provide regarding foreclosure avoidance options. As the Bureau concluded in the 2013 RESPA Servicing Final Rule, a servicer's delinquency management, including these early intervention requirements, plays a significant role in whether the borrower cures the delinquency or ends up in foreclosure.<sup>94</sup> As such, the proposed amendments would aim to address the lack of borrower awareness or hesitancy with respect to the almost 800,000 borrowers who are delinquent but not in forbearance by requiring servicers to provide them with additional information about their available forbearance program options.

Proposed § 1024.39(e)(1) would require, for borrowers who are not in forbearance programs at the time the servicer establishes live contact and where the owner or assignee of the borrower's mortgage loan makes a forbearance program available through the servicer to borrowers experiencing a COVID-19-related hardship, that the servicer ask whether the borrower is experiencing a COVID-19-related hardship. The servicer would be required to complete this requirement promptly after establishing live contact. If the borrower indicates that the borrower is experiencing a COVID-19-related hardship, proposed § 1024.39(e)(1) would require the servicer to list and briefly describe any such forbearance programs made available to borrowers in a COVID-19-related hardship and the actions the borrower must take to be evaluated for such forbearance programs.

Under proposed § 1024.39(e)(1), when the servicer lists and describes available forbearance programs, it would list and briefly describe all forbearance programs made available by the owner or assignee of the borrower's mortgage loan through the servicer to borrowers experiencing a COVID-19-related hardship. The Bureau notes the requirement is not limited to forbearance programs specific to

COVID-19 or only available during the COVID-19 emergency. Programs that meet the proposed requirement may include COVID-19-specific forbearance programs, but would also include generally available programs where COVID-19-related hardships are sufficient to meet the hardship-related requirements for the forbearance program. Examples of forbearance programs a servicer may need to describe to the borrower if this proposal is finalized include any payment forbearance program made pursuant to the CARES Act, section 4022 (15 U.S.C. 9056), investor-provided forbearance programs whose eligibility includes borrowers with COVID-19-related hardship, or State law required COVID-19-related forbearance program options. However, proposed § 1024.39(e)(1) would not require servicers to list and describe forbearance program options for which the borrower is ineligible. For example, under the proposed rule, the servicer would not list and describe forbearance programs that the investor no longer offers.

Under proposed § 1024.39(e)(1), the forbearance programs that servicers must identify include more than just short-term forbearance programs.<sup>95</sup> The Bureau recognizes the current crisis has placed extended financial hardship on many consumers. The extended COVID-19-related hardship may mean that for some borrowers, longer-term options are more appropriate or are necessary to avoid foreclosure. As a result, the Bureau has proposed that servicers provide borrowers with all qualifying forbearance programs, regardless of length.

In addition to a list and description of applicable forbearance programs made available to borrowers experiencing COVID-19-related hardships, proposed § 1024.39(e)(1) would require the servicer to describe the actions the borrower must take to be evaluated for such forbearance programs. The Bureau notes that the proposed requirements to list and briefly describe available forbearance programs and to identify the actions borrowers must take to be evaluated for such programs are modeled on existing requirements in Regulation X, intending that servicers would already have this information available. Under the policy and procedure requirements in the existing rule, including the continuity of contact policy and procedure requirements, servicers must have certain policies and

<sup>93</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10788 (citing to *see, e.g.,* Future of Housing Finance: *Hearing on the current state of the housing finance market and how to facilitate the return of private sector capital into the mortgage markets before H. Subcomm. on Ins., Hous., and Comm. Opportunity of the H. Comm. on Fin. Services*, 112th Cong. 50–51 (2011) (statement of Phyllis Caldwell, Chief, Homeownership Preservation Office, U.S. Dep't. of the Treasury), <https://www.govinfo.gov/content/pkg/CRPT-112hrpt742/html/CRPT-112hrpt742.htm>; Fed. Home Loan Mortg. Corp., *Foreclosure Avoidance Research II: A Follow-Up to the 2005 Benchmark Study 8* (2008), [http://www.freddiemac.com/service/msp/pdf/foreclosure\\_avoidance\\_dec2007.pdf](http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2007.pdf); Fed. Home Loan Mortg. Corp., *Foreclosure Avoidance Research* (2005), [http://www.freddiemac.com/service/msp/pdf/foreclosure\\_avoidance\\_dec2005.pdf](http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2005.pdf); Off. of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers* (June 2007), <https://www.occ.gov/publications-and-resources/publications/community-affairs/community-affairs-publications-archive.html>).

<sup>94</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10788 (citing to Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 768 (2011), <https://digitalcommons.law.uw.edu/wlr/vol86/iss4/8/>; Kristopher Gerardi & Wenli Li, *Mortgage Foreclosure Prevention Efforts*, 95 Fed. Reserve Bank of Atlanta Econ. Rev. 1, 8–9 (2010), [https://www.frbatlanta.org/-/media/documents/research/publications/economic-review/2010/vol95no2\\_gerardi\\_li.pdf](https://www.frbatlanta.org/-/media/documents/research/publications/economic-review/2010/vol95no2_gerardi_li.pdf); Michael A. Stegman *et al.*, *Preventative Servicing is Good for Business and Affordable Homeownership Policy*, 18 Hous. Policy Debate 243, at 274 (2007), <https://communitycapital.unc.edu/wp-content/uploads/sites/340/2007/01/PreventativeServicing.pdf>; *see also* part VII of the 2013 RESPA Servicing Final Rule, *supra* note 13).

<sup>95</sup> Existing § 1024.41(c)(2)(iii) and comment 41(c)(2)(iii) define short-term payment forbearance program as a payment forbearance program that allows the forbearance of payments due over periods of no more than six months.

procedures reasonably designed to ensure that servicer personnel can provide accurate information to borrowers about loss mitigation options available to the borrower from the owner or assignee of the borrower's mortgage loan.<sup>96</sup> In addition, under existing continuity of contact requirements servicers must maintain policies and procedures reasonably designed to ensure that servicer personnel assigned to a delinquent borrower can, among other things, provide the borrower with accurate information about the actions the borrower must take to be evaluated for loss mitigation options.<sup>97</sup>

The Bureau seeks comment on all aspects of proposed § 1024.39(e)(1). Specifically, the Bureau seeks comment on which forbearance options servicers should be required to describe to borrowers pursuant to proposed § 1024.39(e)(1). Currently, the Bureau is proposing to require the servicer to discuss any forbearance program that the owner or assignee of the borrower's mortgage makes available through the servicer for which a borrower with a COVID-19-related hardship could be considered. The Bureau considered requiring servicers to discuss all forbearance program options but believed this approach may be too broad and may not sufficiently limit the programs discussed to those that are applicable to the borrower. Additionally, the Bureau considered requiring servicers to discuss only those forbearance programs specific to the COVID-19 emergency but believed this approach may be too narrow to provide sufficient optionality for the borrower. The Bureau seeks comment on whether it should broaden or narrow the scope of forbearance programs that servicers would be required to discuss with borrowers under proposed § 1024.39(e)(1). The Bureau also seeks comment on whether additional guidance is necessary for servicers to determine which forbearance programs they must discuss with the borrower.

Relatedly, the Bureau also seeks comment on whether limiting the scope of these expanded communications to COVID-19 related hardships until the sunset date presents implementation challenges. Proposed § 1024.39(e)(1) limits the scope of the proposed new requirements to situations where the owner or assignee of the borrower's mortgage loan makes a forbearance program available through the servicer to borrowers experiencing a COVID-19-related hardship and where the

borrower indicates that the borrower is experiencing a COVID-19-related hardship. The Bureau also proposes an August 31, 2022 sunset date for the proposed new requirement. The Bureau seeks comment on whether requiring that servicers provide a list and description of all applicable forbearance program options to all borrowers until the proposed sunset date would be easier for servicers to implement.

In addition, the Bureau seeks comment on whether it should expand the options the servicer must describe to the borrower to include all loss mitigation options available to borrowers experiencing a COVID-19-related hardship that the owner or assignee of the borrower's mortgage makes available through the servicer, instead of only applicable forbearance programs. The Bureau notes that existing § 1024.39(a) would still apply in addition to proposed § 1024.39(e), meaning servicers would still need to mention that loss mitigation options may be available, should the servicer determine it appropriate.

Finally, the Bureau seeks comment on whether it should specify components of the loss mitigation option description the servicer would provide. Proposed § 1024.39(e)(1) would require servicers to list and briefly describe the applicable forbearance programs made available. The Bureau seeks comment on whether it should require that the description include discussion of what repayment options are included in forbearance programs, or what impact the forbearance program has on how the servicer reports the loan to credit reporting agencies.

#### 39(e)(2)

Proposed § 1024.39(e)(2) would temporarily require a servicer to provide certain information promptly after establishing live contact with borrowers currently in a forbearance program made available to those experiencing a COVID-19-related hardship. First, the servicer would be required to provide the borrower with the date the borrower's current forbearance program ends. Second, the servicer would be required to provide a list and brief description of each of the types of forbearance extensions, repayment options and other loss mitigation options made available by the owner or assignee of the borrower's mortgage loan to resolve the borrower's delinquency at the end of the forbearance program. The servicer would also be required to inform the borrower of the actions the borrower must take to be evaluated for such loss mitigation options. Proposed § 1024.39(e)(2) would require the

servicer to provide the borrower with this additional information during the last live contact made pursuant to existing § 1024.39(a) that occurs before the end of the loan's forbearance period.

Although forbearance programs assist borrowers in avoiding foreclosure for a period of time, lengthy forbearance programs can result in heightened foreclosure initiation risk once the program ends. The Bureau is concerned that because some forbearance agreements may require full repayment of the forbore amount at the end of the program, unless the borrower obtains other, additional loss mitigation options such as a payment deferral or loan modification, borrowers may struggle to repay the amount owed at the end of a forbearance program and may be seriously delinquent. In addition, it is possible that a servicer may be permitted to initiate the foreclosure process soon after the borrower exits forbearance. As discussed more fully in the section-by-section analysis of § 1024.41(f), Regulation X generally prohibits servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless the borrower is more than 120 days delinquent.<sup>98</sup> Because, generally, forbearance does not pause the homeowner's underlying delinquency,<sup>99</sup> many borrowers will be more than 120 days delinquent when exiting their forbearance program during the COVID-19 emergency. Yet many borrowers may not take action before the end of forbearance to submit a complete loss mitigation application because the temporary protection provided by forbearance coupled with Federal and State foreclosure moratoria might lead, or at least enable, borrowers to defer thinking about their difficult personal financial issues and instead focus on other pressing concerns, especially in light of the health and economic upheaval caused by the current crisis. Thus, it is possible that a servicer under existing rules would be permitted to refer a loan to foreclosure soon after forbearance ends, unless a foreclosure moratorium or other restriction is in place, or the borrower brings their accounts current. With over 2 million borrowers currently in forbearance programs, and a majority in programs for 12 months or longer, the Bureau is concerned that the extended length of the current forbearance programs may increase the borrower's total delinquency and risk of referral to foreclosure if these borrowers do not

<sup>96</sup> 12 CFR 1024.38(b)(2); 12 CFR 1024.40(b)(1)(i).

<sup>97</sup> 12 CFR 1024.40(b)(1)(ii).

<sup>98</sup> 12 CFR 1024.41(f)(1).

<sup>99</sup> *Supra* note 61 and accompanying text.

receive additional loss mitigation assistance.

However, as noted above, the Bureau is concerned that the unique circumstances during the COVID-19 emergency may have interfered with or may be interfering with some borrowers' ability to obtain and understand important information that the existing rules aim to provide regarding foreclosure avoidance options, preventing them from seeking this necessary loss mitigation assistance. For the borrowers currently in a forbearance program, the proposed additions to early intervention aim to help ensure these borrowers are provided with additional information about when their forbearance program ends, the types of loss mitigation options made available, and the actions a borrower must take to be evaluated. The Bureau believes that this information during the proposed new, temporary intervention may be necessary to educate and encourage more borrowers to seek loss mitigation assistance before the end of forbearance, rather than waiting until their forbearance program has ended. As discussed above, the Bureau believes encouraging borrowers to seek loss mitigation assistance earlier may help ensure that borrowers and servicers have sufficient time for a loss mitigation review before the borrower exits forbearance, reducing the risk of avoidable foreclosure, including foreclosure caused by loss mitigation assistance delays and errors. The Bureau also recognizes that in the current crisis, providing borrowers with specific information about the actions they must take to be evaluated may help to provide consistent and necessary information so that they may obtain loss mitigation assistance in a timely manner.

For these reasons, the Bureau is proposing new § 1024.39(e)(2). Proposed § 1024.39(e)(2) would require that servicers provide borrowers currently enrolled in a forbearance program made available to borrowers experiencing a COVID-19-related hardship additional information promptly after establishing the last live contact with the borrower prior to the expiration of that forbearance program. Proposed § 1024.39(e)(2) would require the servicer to provide the borrower with (1) the date their current forbearance program ends, and (2) a list and brief description of each of the types of forbearance program extension and repayment options and other loss mitigation options made available by the owner or assignee of the borrower's mortgage loan to resolve the borrower's delinquency at the end of the forbearance program. It would also

require the servicer to describe the actions the borrower must take to be evaluated for such loss mitigation options.

Proposed § 1024.39(e)(2) would require servicers to provide information on all loss mitigation options available to the borrower by the owner or assignee of the borrower's mortgage loan, including forbearance program extensions and repayment options, for which a borrower with a COVID-19 hardship might qualify. Given the current conditions and the length of many borrowers' forbearance programs, the Bureau is not proposing to limit this requirement to COVID-19-specific loss mitigation options or programs only provided during the COVID-19 crisis. Rather, the Bureau believes servicers should provide information to borrowers about any options that may meet their specific needs during the crisis, and for which a COVID-related hardship would meet applicable hardship-related requirements under the program. Further, proposed § 1024.39(e)(2) is not limited to a specific type of loss mitigation. Under proposed § 1024.39(e)(2), servicers must provide borrowers with information about all available loss mitigation types, such as repayment plans, loan modifications, short-sales, and others. However, proposed § 1024.39(e)(2) would not require servicers to list and describe loss mitigation options for which the borrower is ineligible.

In addition to listing and describing the applicable loss mitigation options made available to certain borrowers, § 1024.39(e)(2) would also require the servicer to identify the actions the borrower must take to be evaluated for such options. As discussed in the section-by-section analysis of § 1024.39(e)(1) above, the proposed requirements to identify available forbearance programs and the actions borrowers must take to be evaluated for such programs are modeled on existing continuity of contact and other general policies and procedures requirements in Regulation X, so servicers should already have this information.<sup>100</sup> The proposed rule would require that servicers provide the required information promptly after establishing the last live contact prior to the end of the forbearance period.

The Bureau intends proposed § 1024.39(e)(2) to work with the new reasonable diligence obligations in proposed comment 41(b)(1)-4.iv to ensure borrowers receive notification of loss mitigation options that would be

available after their COVID-19-related forbearance program ends. Because the reasonable diligence obligations described in section § 1024.41(b)(1) only apply if a borrower has submitted an incomplete loss mitigation application, proposed comment 41(b)(1)-4.iv would not apply to borrowers who are in forbearance programs that were offered without any evaluation of a loss mitigation application submitted by the borrower or forbearance programs offered based on the evaluation of a complete application. Proposed § 1024.39(e)(2), however, would generally apply to delinquent borrowers with whom the servicer establishes live contact pursuant to § 1024.39(a), even if they have not submitted an incomplete loss mitigation application. Together, the two provisions would complement each other to help ensure that borrowers receive information about loss mitigation options that may be available at the end of their forbearance period even if they have not submitted a loss mitigation application.

Proposed § 1024.39(e)(2) would apply only to the last live contact made pursuant to existing § 1024.39(a) that occurs prior to the end of the forbearance period. Proposed § 1024.39(e)(2) does not require additional live contacts with the borrower beyond those made pursuant to existing § 1024.39(a). Instead, proposed § 1024.39(e)(2) only requires that the servicer provide additional information promptly after establishing live contact pursuant to existing § 1024.39(a), and only requires this additional information be provided during the last live contact established prior to the end of the forbearance period. The last live contact would be calculated based on the date the borrower's forbearance program is scheduled to expire under the terms of the agreement. The Bureau proposes to apply the requirement to the end of the borrower's forbearance agreement in part because it believes that borrowers may defer consideration of loss mitigation options until the end of their current forbearance program. The Bureau believes the information provided by proposed § 1024.39(e)(2) may be most successful in prompting borrower action closer to when borrowers are likely to take that action, rather than, for example, at the beginning of forbearance periods. Additionally, the Bureau understands that some mortgage investors have added specific contact requirements for the COVID-19 emergency, and generally those contacts must occur just prior to the end of certain forbearance

<sup>100</sup> 12 CFR 1024.38(b)(2); 12 CFR 1024.40(b)(1)(i) and (ii).

programs.<sup>101</sup> The Bureau is aware these requirements may have similar or congruent content requirements,<sup>102</sup> but are generally only provided just prior to the end of forbearance programs. To prevent unnecessarily duplicative servicer efforts and potential borrower confusion, the Bureau's proposed timing for § 1024.39(e)(2) requires the additional information be provided promptly after establishing the last required live contact prior to the end of the forbearance period.

The Bureau seeks comment on all aspects of proposed § 1024.39(e)(2). Specifically, the Bureau seeks comment on whether it should consider alternative timing requirements. The Bureau considered requiring that proposed § 1024.39(e)(2) occur a set number of days before the end of the forbearance program, for example, 45 days, but was concerned this would not necessarily allow the servicer to provide the information promptly after establishing live contact under existing requirements. Further, the Bureau was concerned that this may conflict with investor requirements, requiring duplicative contacts to the borrower which may be confusing.

Relatedly, the Bureau also seeks comment on whether proposed § 1024.39(e)(2) would conflict with or duplicate similar investor requirements. The Bureau is aware that some investors have specific content, format, and timing requirements for servicers when contacting borrowers in COVID-19-related forbearance programs approaching the end of their programs. For example, during the current crisis, the GSEs have added additional quality right party contacts (QRPCs) for servicers to ensure they contact borrowers in forbearance.<sup>103</sup> The Bureau

seeks comment on whether proposed § 1024.39(e)(2) would conflict with or duplicate investor requirements such as these, particularly considering the proposal and investor requirements respective format, content, and timing.

The Bureau also seeks comment on whether to require these expanded communications with all borrowers in forbearance until the sunset date rather than limiting the scope to borrowers in a forbearance made available to borrowers experiencing a COVID-19 related hardship. Proposed § 1024.39(e)(2) limits the scope of the proposed new requirements to situations where the borrower is in a forbearance program made available to borrowers experiencing a COVID-19 related hardship. The Bureau also proposes an August 31, 2022 sunset date for the proposed new requirement. The Bureau seeks comment on whether expanding the proposed requirement to include all borrowers in forbearance would be easier for servicers to implement.

The Bureau also seeks comment on whether it has appropriately limited the number of times the borrower should receive the information in proposed § 1024.39(e)(2). Given that the current crisis may mean borrowers may need to seek one or more extensions of their forbearance programs, the Bureau recognizes that tying the proposed timing of the requirements in § 1024.39(e)(2) to the end of the forbearance could result in some borrowers receiving the information more than once if the borrower extends the forbearance program. The Bureau seeks comment on whether the duplicity of information would be confusing for borrowers, and if there is an alternative approach that would prevent this duplicity.

Additionally, the Bureau seeks comment on the scope of the content in proposed § 1024.39(e)(2). The Bureau proposed only to require servicers to provide the date the borrower's forbearance program ends and to list and briefly describe loss mitigation options made available to certain borrowers and to identify the actions the borrower must take to be evaluated for such options. Given potential borrower

confusion about the impacts of foreclosure on their mortgage, as discussed above, the Bureau also considered requiring the servicer to provide the borrower with information to help the borrower identify whether they may be referred to foreclosure if they did not obtain additional loss mitigation at the end of the forbearance program, such as information about the repayment options detailed in the forbearance agreement, the credit reporting impacts during the forbearance period, or the delinquency status of their account at the end of the forbearance program. However, the Bureau is concerned that this information may not be readily available to the servicer's assigned personnel or may be too complex to provide in a meaningful way during a live contact. The Bureau is also concerned that this may further cause borrowers to view servicer contacts as adversarial and with apprehension, rather than as a collaboration to bring the account current. The Bureau seeks comment on whether this information should be required under proposed § 1024.39(e)(2), and if so, seeks suggestions on borrower-friendly ways to provide that information.

Finally, the Bureau seeks comment on whether proposed § 1024.39(e)(2) should exclude borrowers who will not need loss mitigation at the end of their forbearance because, for example, the terms of their forbearance agreement include or are combined with an agreement for deferral of the forborne amounts or a repayment plan. The Bureau considered adding qualifiers to proposed § 1024.39(e)(2) that would limit application of the provision to only those borrowers whose mortgage accounts would be considered delinquent after the forbearance program, or to borrowers whose forbearance agreements did not include a provision, such as deferral, that would bring the account current if the borrower performed under the terms of the forbearance agreement. The Bureau ultimately did not include these qualifiers in the proposal because it understands that it may be unlikely that a forbearance program would include such a provision to bring the account current. The Bureau seeks comment on whether it should consider one of these qualifiers. The Bureau also seeks comment on whether it should limit the scope of proposed § 1024.39(e)(2) to exclude borrowers with forbearance agreements that bring the borrower's account current in some way if the borrower performs under the terms of the agreement.

<sup>101</sup> Fed. Nat'l Mortg. Ass'n, *Lender Letter (LL-2021-02)* (Feb. 25, 2021), <https://singlefamily.fanniemae.com/media/24891/display>; Fed. Home Loan Mortg. Corp., *Bulletin 2020-10: Temporary Servicing Guidance Related to COVID-19* (Apr. 8, 2020), <https://guide.freddiemac.com/app/guide/bulletin/2020-10>; see also Fed. Home Loan Mortg. Corp., *Bulletin 2021-6 Temporary Servicing Guidance Related to COVID-19* (Feb. 10, 2021), <https://guide.freddiemac.com/app/guide/bulletin/2021-6>; Fed. Home Loan Corp., *Bulletin 2020-4 Temporary Servicing Guidance Related to COVID-19* (Mar. 18, 2020) <https://guide.freddiemac.com/app/guide/bulletin/2020-4>.

<sup>102</sup> See, e.g., *id.* For example, the Bureau understands that some investors may require a waterfall structure during contacts discussing loss mitigation options with the borrower, where loss mitigation options are presented in a specified order. The Bureau does not believe that proposed § 1024.39(e)(2) would prohibit servicers from structuring the list and description as required by investors, should the servicer choose to comply with both the proposed rule and investor requirements at the same time.

<sup>103</sup> Fed. Nat'l Mortg. Ass'n, *Lender Letter (LL-2021-02)* (Feb. 25, 2021), <https://>

[singlefamily.fanniemae.com/media/24891/display](https://singlefamily.fanniemae.com/media/24891/display); Fed. Home Loan Mortg. Corp., *Bulletin 2020-10: Temporary Servicing Guidance Related to COVID-19* (Apr. 8, 2020), <https://guide.freddiemac.com/app/guide/bulletin/2020-10>; see also Fed. Home Loan Mortg. Corp., *Bulletin 2021-6 Temporary Servicing Guidance Related to COVID-19* (Feb. 10, 2021), <https://guide.freddiemac.com/app/guide/bulletin/2021-6>; Fed. Home Loan Corp., *Bulletin 2020-4 Temporary Servicing Guidance Related to COVID-19* (Mar. 18, 2020) <https://guide.freddiemac.com/app/guide/bulletin/2020-4>.

*Section 1024.41 Loss Mitigation Procedures*

41(b) Receipt of a Loss Mitigation Application

41(b)(1) Complete Loss Mitigation Application

Section 1024.41(b)(1) provides that a complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. It further provides that a servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.<sup>104</sup>

Comment 41(b)(1)–4 provides guidance to servicers on what is considered reasonable diligence to complete loss mitigation applications. In general, a servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Comment 41(b)1–4.iii discusses a servicer’s reasonable diligence obligations when a servicer offers a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application and provides the borrower the written notice pursuant to § 1024.41(c)(2)(iii). If the borrower remains in compliance with the short-term payment forbearance program or short-term repayment plan, and the borrower does not request further assistance, the servicer may suspend reasonable diligence efforts until near the end of the payment forbearance program or repayment plan. However, if the borrower fails to comply with the program or plan or requests further assistance, the servicer must immediately resume reasonable diligence efforts. Near the end of a short-term payment forbearance program offered based on an evaluation of an incomplete loss mitigation application pursuant to § 1024.41(c)(2)(iii), and prior to the end of the forbearance period, if the borrower remains delinquent, a servicer must contact the borrower to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation. For the reasons discussed below, the Bureau is amending comment 41(b)(1)–4 to clarify the expectations for servicers

when the borrower is in a short-term payment forbearance made available to a borrower with a COVID–19-related hardship that was offered based on the evaluation of an incomplete application.

During the past year, mortgage servicers have offered short-term payment forbearance options like forbearance programs made available by the CARES Act to borrowers facing COVID–19-related hardships. As discussed more fully in part II, over 2 million borrowers remain in forbearance programs, including large numbers who will have been in forbearance programs for over a year when they exit. It is expected that a large number of borrowers who took advantage of a full 18 months of forbearance made available to borrowers with federally backed mortgages will begin to exit forbearance in September 2021. The Bureau expects that these borrowers will have had longer term hardships and may require loan modifications or other loss mitigation options to bring their loans current and to avoid referral to foreclosure. The Bureau is also concerned that the present unique circumstances, where forbearance periods can be extended to 18 months, have interfered with borrower’s ability to understand and focus on the risk of foreclosure after the forbearance period and important information regarding foreclosure avoidance options. Indeed, in the circumstances of the pandemic, a borrower in a long-term forbearance with no immediate payments due and with protection from foreclosure may be likely to defer consideration of their long-term ability to meet their monthly mortgage payment obligations in favor of short-term needs concerning health, childcare, and lost wages. The Bureau is also concerned servicers may face challenges when a large number of borrowers may be exiting forbearance and seeking loss mitigation review within the same short period of time later this year. During the COVID–19 emergency, to help maximize the likelihood that borrowers exiting forbearance have sufficient time to complete a loss mitigation application and the opportunity to start being evaluated for loss mitigation options before exiting forbearance, servicers need to reach out to borrowers to perform reasonable diligence regarding completion of an incomplete loss mitigation application with ample time before a forbearance ends.

Current comment 41(b)(1)–4.iii provides that reasonable diligence means servicers must contact the borrower before the short-term payment forbearance program ends, but it does not specify when servicers must make

the contact. The Bureau is concerned that some servicers may not make this contact early enough for borrowers affected by the unique circumstances of the COVID-emergency to complete a loss mitigation application before the end of the forbearance period. Therefore, the Bureau believes that it may be appropriate to provide additional clarity as to when servicers must make this contact with certain borrowers during this time.

For these reasons, the Bureau is proposing to add a new comment 41(b)1–4.iv which states that if the borrower is in a short term payment forbearance program made available to borrowers experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency, including a payment forbearance program made pursuant to the Coronavirus Economic Stability Act, section 4022 (15 U.S.C. 9056), that was offered based on evaluation of an incomplete application, a servicer must contact the borrower no later than 30 days prior to the end of the forbearance period to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation. If the borrower requests further assistance, the servicer should exercise reasonable diligence to complete the application prior to the end of the forbearance period. The servicer must also continue to exercise reasonable diligence to complete the loss mitigation application prior to the end of forbearance period.<sup>105</sup>

The Bureau intends proposed comment 41(b)1–4.iv to work with the proposed new intervention live contact requirements in proposed § 1024.39(e)(2) to ensure borrowers receive notification of loss mitigation options that would be available after their COVID–19-related forbearance program ends. Because the reasonable diligence obligations described in § 1024.41(b)(1) only apply if a borrower has submitted an incomplete loss mitigation application, proposed comment 41(b)(1)–4.iv would not apply to borrowers who are in forbearance programs that were offered without any evaluation of a loss mitigation application. Proposed § 1024.39(e)(2), however, would generally apply to delinquent borrowers with whom the servicer established live contact pursuant to section 1024.39(a), even if they have not submitted an incomplete

<sup>104</sup> Small servicers, as defined in Regulation Z, 12 CFR 1026.41(e)(4) are not subject to these requirements. 12 CFR 1024.30(b)(1).

<sup>105</sup> However, a servicer would not be required to continue reasonable diligence efforts if the borrower accepts a loss mitigation option offered based on the evaluation of an incomplete application pursuant to § 1024.41(c)(2)(v) or proposed § 1024.41(c)(2)(vi).



loss mitigation application. Together, the two provisions would complement each other to ensure that borrowers receive information about loss mitigation options that may be available at the end of their forbearance period.

Requiring servicers to contact the borrower at least 30 days prior to the end of the forbearance as set out in proposed § 1024.41(b)(1)–4 should help maximize the likelihood that borrowers have time to complete a loss mitigation application while being close enough to the end of forbearance that borrowers are incentivized to actually do so. The Bureau solicits comment on the proposed 30-day deadline for completing the reasonable diligence contact at the end of the forbearance and whether a different deadline is appropriate.

Proposed comment 41(b)(1)–4.iv limits the circumstances when servicers must comply with the requirements of the proposed comment to situations when the borrower is in a short-term payment forbearance program made available to borrowers experiencing a COVID–19 related hardship. The Bureau solicits comment on whether to, instead, extend these requirements to all borrowers exiting short-term payment forbearance programs during a specified time period. The Bureau seeks comment on whether that alternative would be easier for servicers to implement.

#### 41(c) Evaluation of Loss Mitigation Applications

##### 41(c)(2)(i) In General

Section 1024.41(c)(2)(i) states that, in general, servicers shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by making an offer based upon an incomplete application. For ease of reference, this section-by-section analysis generally refers to this provision as the “anti-evasion requirement.” Currently, the provision identifies three general exceptions to this anti-evasion requirement, § 1024.41(c)(2)(ii), (iii), and (v). As further described in the section-by-section analysis of § 1024.41(c)(2)(vi) below, the Bureau is proposing to add a temporary exception to this anti-evasion requirement in new § 1024.41(c)(2)(vi) for certain loan modification options made available to borrowers experiencing COVID–19-related hardships. The Bureau is therefore proposing to amend 1024.41(c)(2)(i) to reference the new proposed exception in § 1024.41(c)(2)(vi). As described more

fully below, the Bureau solicits comment on the proposed amendment.

##### 41(c)(2)(v) Certain COVID–19-Related Loss Mitigation Options

Section 1024.41(c)(2)(v) currently allows servicers to offer a borrower certain loss mitigation options made available to borrowers experiencing a COVID–19-related hardship based upon the evaluation of an incomplete application, provided that certain criteria are met. The Bureau added this provision to the mortgage servicing rules in its June 2020 IFR. Section 1024.41(c)(2)(v)(A)(1) refers to a COVID–19-related hardship as a financial hardship due, directly or indirectly, to the COVID–19 emergency. Section 1024.41(c)(2)(v)(A)(1) further states that the term COVID–19 emergency has the same meaning as under the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)).

As discussed in the section-by-section analysis of § 1024.30, the Bureau is proposing to define the term “COVID–19-related hardship” for purposes of subpart C, including § 1024.41(c)(2)(v), as “a financial hardship due, directly or indirectly, to the COVID–19 emergency as defined in the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)).” Thus, the Bureau proposes a conforming amendment to § 1024.41(c)(2)(v) to utilize the proposed new term. The Bureau does not intend for this proposed amendment to substantively change § 1024.41(c)(2)(v). The Bureau solicits comment on the proposed amendment to § 1024.41(c)(2)(v) and does not seek comment on other aspects of existing § 1024.41(c)(2)(v).

##### 41(c)(2)(vi) Certain COVID–19-Related Loan Modification Options

Section 1024.41(c)(2)(i) states that, in general, servicers shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by making an offer based upon an incomplete application.<sup>106</sup> The Bureau added a temporary exception to this anti-evasion requirement in its June 2020 IFR. This exception currently allows servicers to offer a borrower certain loss mitigation options made available to borrowers experiencing a COVID–19-related hardship based upon the evaluation of an incomplete application, provided that certain criteria are met. These criteria are intended to align with the criteria outlined in FHFA’s COVID–19 payment

deferral and other comparable programs, such as FHA’s COVID–19 partial claim.<sup>107</sup> For the reasons discussed below, the Bureau is proposing to add a new temporary exception to the anti-evasion requirement in § 1024.41(c)(2)(i) in new § 1024.41(c)(2)(vi) for certain loan modification options made available to borrowers with COVID–19-related hardships.

As described in more detail in the section-by-section analysis of § 1024.41(f), § 1024.41(f)(1) generally prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, unless the borrower’s mortgage loan obligation is more than 120 days delinquent. Regulation X generally refers to this prohibition as a pre-foreclosure review period. For ease of reference, this section-by-section analysis generally refers to the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process as “foreclosure referral” or the “first notice or filing.”

As discussed in part II, Federal foreclosure moratoria are scheduled to end in late June 2021, and borrowers who entered CARES Act forbearance programs when those programs first became available and extended them to the maximum time period will be required to begin repayment in September 2021. Most borrowers with loans that are still in forbearance programs as of April 2021 will be required to exit by the end of November 2021. This could result in a sudden and sharp increase in loss mitigation-related default servicing activity around the same time. Because forbearance generally does not pause the homeowner’s underlying delinquency,<sup>108</sup> many borrowers with loans that are currently in forbearance programs will become eligible for foreclosure referral shortly after exiting a forbearance program or as soon as Federal foreclosure moratoria are lifted, unless their delinquencies are resolved. Often forbearance agreements do not specify how borrowers must repay the forborne payments at the conclusion of the forbearance program.

Through certain loss mitigation options, such as payment deferral and loan modification programs, eligible

<sup>107</sup> 85 FR 39055, 39059, 39061–62 (June 30, 2020) (a description of the criteria that deferrals and partial claims must meet to qualify for the exception in § 1024.41(c)(2)(v)). The Bureau is proposing similar criteria for the proposed new exception, with adjustments for the different types of loss mitigation programs that the Bureau intends for the proposed new exception to cover.

<sup>108</sup> See *supra* note 61 and accompanying text.

<sup>106</sup> *Id.*

borrowers can eliminate the immediate potential risk of foreclosure referral. Certain investors and insurers, such as the GSEs and FHA, permit servicers to offer some of these programs using streamlined application procedures, under which they do not need to collect a complete loss mitigation application from the borrower.

For example, as the Bureau discussed in the June 2020 IFR, the FHFA COVID-19 payment deferral and certain similar programs provide benefits both to borrowers and servicers during the COVID-19 emergency. Through these programs, borrowers who can resume their normal periodic payments but who cannot afford to repay the forbore or delinquent amounts in the short-term would be able to eliminate the immediate potential risk of losing their homes to foreclosure, resume repaying the mortgage loan with no delinquency and no additional fees or interest, and better plan how eventually to repay the forbore or delinquent amount that has been deferred. In addition, the Bureau noted that permitting servicers to utilize streamlined application procedures to offer these options would help ensure that servicers have sufficient resources to address requests from the unusually large number of borrowers who will be seeking assistance as many forbearance programs end. The Bureau acknowledged that borrowers accepting a loss mitigation option under the new streamlined procedures permitted in the June 2020 IFR would not receive protections under § 1024.41 that are critical in other circumstances, but concluded that other new protections established in the IFR would provide sufficient safeguards for borrowers in the narrow context of the COVID-19 emergency.<sup>109</sup>

As discussed in part II, it appears that many borrowers who will exit forbearance programs in November 2021 will do so with lengthy delinquencies and may be in need of post-forbearance foreclosure avoidance options, such as loan modifications that lower their monthly payments, extend the term of the loan, or both. The Bureau believes that it may be appropriate to add a new exception to the servicing rule's anti-evasion requirement for certain loan modification options, like the GSEs' flex modification programs, FHA's COVID-19 owner-occupant loan modification, and other comparable programs ("streamlined loan modifications"). Like the payment deferral programs discussed in the June 2020 IFR, the Bureau understands that servicers may utilize streamlined application

procedures for these programs that do not require a borrower to submit a complete loss mitigation application. The Bureau believes that providing additional flexibility under the rule's loss mitigation procedures for certain streamlined loan modifications may be appropriate during the COVID-19 emergency, which presents extraordinary circumstances.

Streamlined application procedures, such as those authorized by the GSEs for certain loss mitigation options such as flex modifications, may help ensure that servicers have sufficient resources to efficiently and accurately respond to loss mitigation assistance requests from the unusually large number of borrowers who will be seeking assistance from them in the coming months as Federal foreclosure moratoria and many forbearance programs end. And borrowers dealing with the social and economic effects of the COVID-19 emergency may be less likely than they would be under normal circumstances to take the steps necessary to complete a loss mitigation application to receive a full evaluation. This could prolong their delinquencies and put them at risk for foreclosure referral. Moreover, by allowing servicers to assist borrowers eligible for streamlined loan modifications more efficiently, servicers will have more resources to provide other loss mitigation assistance to borrowers who are ineligible for or do not want streamlined loan modifications.

The Bureau believes that loan modifications that satisfy the proposed eligibility criteria for the new exception to the anti-evasion requirement would protect borrowers from certain potential harms, such as the financial strain of being required to quickly repay all forbore amounts, if they accept an offer of a loan modification eligible for the proposed new exception.<sup>110</sup> As discussed more fully below, to be eligible for the proposed new exception, the loan modification option would need to satisfy certain criteria. Specifically, the loan modifications eligible for the proposed new exception must limit a potential term extension to 480 months, not increase the required monthly principal and interest payment, not charge a fee associated with the option, and waive certain other fees or charges. For loan modifications to qualify under the proposed new

<sup>110</sup> As discussed more fully below, receiving a streamlined loan modification under the proposed exception based on an incomplete application generally would not remove a borrower's right under § 1024.41 to submit a complete loss mitigation application and receive an evaluation for all available loss mitigation options.

exception, they must not charge interest on amounts that are deferred and will not become due until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures. However, loan modifications that charge interest on past due amounts that are capitalized into a new modified term could qualify for the proposed new exception, as long as they otherwise satisfy all of the criteria in proposed § 1024.41(c)(2)(vi)(A). To qualify for the proposed new exception, a loan modification must also either be designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification or cause any preexisting delinquency to end upon the borrower's acceptance of the offer.

These proposed criteria are intended to remove the immediate threat of foreclosure referral. They also would help ensure that borrowers in forbearance programs would not face any additional fees or a balloon payment immediately after their forbearance programs end, and they would ease the financial strain of having to make additional payments to repay any past due amounts. As a result of the proposed eligibility criteria, borrowers receiving one of the covered loan modifications would have additional time to repay past due amounts that may be capitalized and would have years to plan to address amounts due that are deferred until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures. This may be particularly important during the COVID-19 emergency, as many borrowers may be facing extended periods of economic uncertainty.

The Bureau acknowledges that borrowers accepting a loan modification offer under the new proposed exception would not receive protections under § 1024.41 that are critical in other circumstances. As the Bureau explained in the 2013 RESPA Servicing Final Rule, the general requirement to evaluate a borrower for all available loss mitigation options based on a single, complete application ensures that borrowers have a full understanding of their loss mitigation options when deciding on a program.<sup>111</sup> It also makes the loss mitigation application process more efficient by eliminating multiple, sequential evaluations that are sometimes based on similar application

<sup>111</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10828.

<sup>109</sup> 85 FR 39055, 39060-61 (June 30, 2020).

information,<sup>112</sup> with the resulting efficiency often saving borrowers time and resources.

The Bureau believes that the exception set forth in proposed § 1024.41(c)(2)(vi) would be unlikely to affect this benefit in most cases, given the narrow scope and particular circumstances of the proposed exception. Even if a borrower may be interested in and eligible for another form of loss mitigation besides a streamlined loan modification, receiving a streamlined loan modification would not generally remove the borrower's right under § 1024.41 to submit a complete loss mitigation application and receive an evaluation for all available options after the streamlined loan modification is in place.

Further, to be eligible for the exception under proposed § 1024.41(c)(2)(vi)(A), a loan modification must bring the loan current or be designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification. In most cases, a borrower must be more than 120 days delinquent before a servicer may make the first notice or filing required under applicable law to initiate foreclosure proceedings. Thus, if a borrower wishes to pursue another loss mitigation option after accepting a permanent loan modification offer, the borrower will still have a considerable amount of time to complete a loss mitigation application before they would be at risk for foreclosure.

Additionally, if a borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or requests further assistance, under proposed § 1024.41(c)(2)(vi)(B) the servicer must immediately resume reasonable diligence efforts to collect a complete loss mitigation application as required under § 1024.41(b)(1). As further discussed below, the Bureau seeks comment about whether and in what manner to provide additional foreclosure protections to borrowers who have accepted a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A), but whose loans have not yet been permanently modified.

The Bureau requests comment on all aspects of proposed § 1024.41(c)(2)(vi), including on whether the proposed new exception would establish sufficient protections for borrowers and whether it

would provide operational benefits for servicers. The Bureau also requests comment on whether the Bureau should adopt additional or different eligibility criteria. The Bureau also solicits comment on whether proposed § 1024.41(c)(2)(vi) would adequately preserve a borrower's rights under § 1024.41 to submit a complete loss mitigation option and receive an evaluation for all available loss mitigation options after the borrower accepts an offer under proposed § 1024.41(c)(2)(vi). Additionally, the Bureau solicits comment on whether and how a borrower's future eligibility for loss mitigation options may be impacted after a borrower accepts or rejects an offer for a streamlined loan modification under proposed § 1024.41(c)(2)(vi).

#### 41(c)(2)(vi)(A)

The Bureau is proposing to add a temporary exception to the anti-evasion requirement in § 1024.41(c)(2)(i) under new § 1024.41(c)(2)(vi) for certain loan modifications that are made available to borrowers experiencing COVID-19-related hardships and that satisfy certain criteria specified in proposed § 1024.41(c)(2)(vi)(A)(1)-(4), described more fully below. Proposed § 1024.41(c)(2)(vi)(A)(1)-(4) sets forth the minimum specific criteria that the loan modification option would have to meet for the new anti-evasion requirement exception to apply. Under the proposal, the loan modification option would need to extend the term of the loan by no more than 480 months from the date the loan modification is effective and not cause the borrower's monthly required principal and interest payment to increase. For a loan modification option to qualify, a servicer would also be prohibited from charging interest on amounts that the borrower is permitted to delay paying until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures. In addition, the servicer would be prohibited from charging any fee in connection with the loan modification option, and the servicer must waive all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the loan modification option. The proposed anti-evasion requirement exception would also be limited to loan modification options made available to borrowers experiencing COVID-19-related hardships, and it would require that either the borrower's acceptance of the loan modification offer end any preexisting delinquency on the mortgage loan or the loan modification

offer be designed to end any preexisting delinquency upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification.

The Bureau understands that certain loan modification programs, including the GSEs' flex modifications, can involve, among other features, the capitalization of past due amounts, potential resetting of the interest rate, and deferral of principal to reach a certain mark-to-market loan to value ratio. The Bureau is not proposing to require or prohibit the incorporation of these features into loan modifications for them to qualify for the proposed exception outlined in § 1024.41(c)(2)(vi).<sup>113</sup> A loan modification option would qualify for the proposed exception as long as it satisfies all of the applicable criteria in § 1024.41(c)(2)(vi)(A). In allowing flexibility beyond the proposed term extension limits and monthly payment increase prohibition in proposed § 1024.41(c)(2)(vi)(A), the Bureau seeks to ensure that a variety of loan modifications are available to borrowers experiencing COVID-19-related hardships.

The Bureau solicits comment on the proposed amendment, including on whether the Bureau should consider additional criteria for the proposed new exception and on whether the proposed criteria would present obstacles for servicers in utilizing the proposed new exception.

#### 41(c)(2)(vi)(A)(1)

Under proposed § 1024.41(c)(2)(vi)(A), servicers would be permitted to offer a loan modification based on evaluation of an incomplete application, as long as the loan modification meets all of the additional criteria set forth in § 1024.41(c)(2)(vi)(A)(1)-(4). Under proposed § 1024.41(c)(2)(vi)(A)(1), the first criterion is that the loan modification must extend the term of the loan by no more than 480 months from the date the loan modification is effective and not cause the borrower's monthly required principal and interest payment to increase.

<sup>113</sup> As noted above, for loan modifications to qualify under the proposed new exception, they must not charge interest on amounts that are deferred and will not become due until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures. However, loan modifications that charge interest on past due amounts that are capitalized into a new modified term could qualify for the proposed new exception, as long as they otherwise satisfy all of the criteria in proposed § 1024.41(c)(2)(vi)(A).

<sup>112</sup> *Id.*

As noted in the section-by-section analysis of § 1024.41(c)(2)(vi) above, the Bureau believes that it may be advantageous to borrowers and servicers alike to facilitate the timely transition of eligible borrowers into certain streamlined loan modifications that enable borrowers experiencing COVID-19-related hardships to quickly resume repaying the mortgage loan with no delinquency and thus eliminate the immediate potential risk of referral to foreclosure.

The Bureau understands that the GSEs offer a flex modification entailing, among other terms, an extension of the borrower's mortgage term to 480 months and no increase in the monthly required principal and interest payment amount.<sup>114</sup> Similarly, FHA offers a COVID-19 owner occupant loan modification with a term of 360 months that, except in certain circumstances, does not entail an increase in the monthly required principal and interest payment amount. FHA guidance provides that a borrower's monthly required principal and interest payment amount may increase if the borrower "has exhausted the 30 percent maximum statutory value of all Partial Claims for an FHA-insured Mortgage."<sup>115</sup>

The Bureau believes that the proposed term extension requirements and prohibitions on monthly required principal and interest payment amount increases adopted by the GSEs and FHA will provide valuable assistance to borrowers qualifying for these programs in avoiding foreclosure and resolving delinquencies. Therefore, the Bureau is proposing to permit servicers to offer a loan modification based on evaluation of an incomplete application that extends the term of the loan by no more than 480 months from the date the loan modification is effective and does not cause the borrower's monthly required principal and interest payment to increase, as long as the loan modification meets all of the additional

criteria set forth in proposed § 1024.41(c)(2)(vi)(A).

The Bureau solicits comment on this proposed eligibility criterion, including whether this criterion creates risks for borrowers and whether it would present implementation challenges for servicers. In particular, the Bureau solicits comment on whether borrowers and servicers may benefit from additional flexibility to extend loan terms beyond 480 months from the date the loan modification is effective, and whether borrowers and servicers may benefit from additional flexibility to increase the monthly required principal and interest payment amount such as, for example, when a borrower's loan is insured by FHA and the borrower has exceeded FHA's applicable thresholds for partial claims.

#### 41(c)(2)(vi)(A)(2)

Proposed § 1024.41(c)(2)(vi)(A)(2) would provide that, to qualify for the anti-evasion requirement exception, amounts deferred until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures must not accrue interest. The GSEs specify in their flex modification guidelines that amounts deferred until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures must not accrue interest.<sup>116</sup> The Bureau is proposing the loan modification maturity language in § 1024.41(c)(2)(vi)(A)(2) to align with what it understands to be the practice of the GSEs and FHA in deferring certain amounts until the end of the modified loan term.

As noted in the section-by-section analysis of proposed § 1024.41(c)(2)(vi)(A) above, proposed § 1024.41(c)(2)(vi)(A) would not prohibit the capitalization of past due

amounts into a new modified term for a loan modification to qualify for the exception outlined in that section. However, when amounts are deferred and do not become due until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures, a loan modification option would only qualify for the anti-evasion requirement exception in proposed § 1024.41(c)(2)(vi) if those amounts do not accrue interest. This criterion would avoid imposing additional economic hardship on borrowers who accept an offer of a loan modification made pursuant to the proposed anti-evasion exception.

The GSEs also specify that amounts deferred until the mortgage loan is transferred or the unpaid principal balance (UPB) is paid off do not accrue interest. The Bureau seeks comment on whether to specify in a final rule that interest cannot be charged on amounts deferred until UPB pay off, transfer, or both.

Proposed § 1024.41(c)(2)(vi)(A)(2) would also provide that, to qualify for the anti-evasion requirement exception in § 1024.41(c)(2)(vi), a servicer must not charge any fee in connection with the loan modification option, and a servicer must waive all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the option. This criterion would avoid imposing additional economic hardship on borrowers who accept an offer of a loan modification made pursuant to the proposed anti-evasion exception.

The Bureau notes that some investors or insurers, such as FHA, may only require servicers to waive fees incurred after the beginning of the COVID-19 pandemic, but provide servicers with discretion to waive other fees. The Bureau recognizes that offers of loan modifications where the servicer elects not to waive such fees or charges, including some FHA COVID-19 owner occupant loan modifications, would not qualify for the proposed new anti-evasion requirement exception. The Bureau invites comment on whether the proposed fee waiver provision in § 1024.41(c)(2)(vi)(A)(2) is appropriate and on whether it should be further limited by, for example, requiring that only fees incurred after a certain date be waived for a loan modification option to qualify for the anti-evasion requirement exception in proposed § 1024.41(c)(2)(vi). The Bureau also solicits comment on all other aspects of proposed § 1024.41(c)(2)(vi)(A)(2).

<sup>114</sup> See Fed. Home Loan Mortg. Corp., *Freddie Mac Flex Modification Reference Guide* (Mar. 2021), [https://sf.freddiemac.com/content/\\_assets/resources/pdf/other/flex\\_mod\\_ref\\_guide.pdf](https://sf.freddiemac.com/content/_assets/resources/pdf/other/flex_mod_ref_guide.pdf); Fed. Nat'l Mortg. Ass'n, *Servicing Guide: D2-3.2-07: Fannie Mae Flex Modification* (Sept. 9, 2020), <https://servicing-guide.fanniemae.com/THE-SERVICING-GUIDE/Part-D-Providing-Solutions-to-a-Borrower/Subpart-D2-Assisting-a-Borrower-Who-is-Facing-Default-or/Chapter-D2-3-Fannie-Mae-s-Home-Retention-and-Liquidation/Section-D2-3-2-Home-Retention-Workout-Options/D2-3-2-07-Fannie-Mae-Flex-Modification/1042575201/D2-3-2-07-Fannie-Mae-Flex-Modification-09-09-2020.htm>.

<sup>115</sup> U.S. Dep't of Hous. and Urban Dev., *Mortgagee Letter 2021-05* at 10 (Feb. 16, 2021), <https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-05hsgml.pdf>.

<sup>116</sup> The Bureau notes that a similar provision in the existing COVID-19 related anti-evasion requirement exception, § 1024.41(c)(2)(v)(A)(1), does not reference loan modification maturity but instead references the point when the term of the mortgage loan ends. Section 1024.41(c)(2)(v)(A)(1) goes on to define the term of the mortgage loan as the term of the mortgage loan according to the obligation between the parties in effect when the borrower is offered the loss mitigation option. The Bureau understands that, when streamlined loan modifications involve deferral of certain amounts until the end of the loan, the GSEs and FHA defer these amounts until the end of the modified loan term. By contrast, for payment deferral programs that may qualify for the existing anti-evasion requirement exception in § 1024.41(c)(2)(v), the GSEs and FHA defer certain amounts until the end of term in effect prior to the servicer offering the loss mitigation option which, in most cases, is likely the original term of the loan. The Bureau emphasizes that it does not intend to substantively change the requirements of existing § 1024.41(c)(2)(v).

## 41(c)(2)(vi)(A)(3)

Proposed § 1024.41(c)(2)(vi)(A)(3) would require that, to qualify for the anti-evasion requirement exception, the loan modification in proposed § 1024.41(c)(2)(vi)(A) must be made available to borrowers experiencing a COVID-19-related hardship. As discussed in the section-by-section analysis of § 1024.30, the Bureau is proposing to define the term “COVID-19-related hardship” as “a financial hardship due, directly or indirectly, to the COVID-19 emergency as defined in the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)).”

As noted in part II, the COVID-19 emergency presents a unique period of economic uncertainty, during which borrowers may be facing extended periods of financial hardship and servicers expect to face extraordinary operational challenges to assist large numbers of delinquent borrowers. The Bureau, therefore, proposes to limit the proposed anti-evasion requirement exception in § 1024.41(c)(2)(vi)(A) to loan modifications made available to borrowers experiencing a COVID-19-related hardship. The Bureau solicits comment on whether to, instead, condition eligibility on loan modifications offered during a specified time period, regardless of whether the option is available to borrowers with a COVID-19 related hardship. The Bureau seeks comment on whether that alternative would be easier for servicers to implement. The Bureau also solicits comment on all other aspects of proposed § 1024.41(c)(2)(vi)(A)(3).

## 41(c)(2)(vi)(A)(4)

Proposed § 1024.41(c)(2)(vi)(A)(4) would require that either the borrower’s acceptance of a loan modification offer must end any preexisting delinquency on the mortgage loan, or a loan modification offered must be designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer’s requirements for completing a trial loan modification plan and accepting a permanent loan modification, for a loan modification to qualify for the proposed anti-evasion requirement exception in § 1024.41(c)(2)(vi). As discussed below in the section-by-section analysis of § 1024.41(c)(2)(vi)(B), with respect to borrowers who may be required to complete a trial loan modification plan, the Bureau is also proposing in § 1024.41(c)(2)(vi)(B), discussed more fully below, to require a servicer to immediately resume reasonable diligence efforts to complete a loss

mitigation application as required under § 1024.41(b)(1) if the borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or if the borrower requests further assistance. In the section-by-section analysis of § 1024.41(c)(2)(vi)(B), the Bureau also solicits comment on providing additional foreclosure protections for borrowers who may be required to complete a trial loan modification plan.

The Bureau believes that these proposed provisions, taken together, would help ensure that borrowers who accept a loan modification offered under proposed § 1024.41(c)(2)(vi) have ample time to complete an application and be reviewed for all loss mitigation options before foreclosure can be initiated. Servicers are generally prohibited from making the first notice or filing until a mortgage loan obligation is more than 120 days delinquent.<sup>117</sup> If the borrower’s acceptance of a loan modification offer ends any preexisting delinquency on the mortgage loan, § 1024.41(f)(1)(i) would prohibit a servicer from making a foreclosure referral until the loan becomes delinquent again, and until that delinquency exceeds 120 days. Similarly, if the loan modification offered is designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer’s requirements for completing a trial loan modification plan and accepting a permanent loan modification and the loan modification is finalized, § 1024.41(f)(1)(i) would prohibit a servicer from making a foreclosure referral until the loan becomes delinquent again after the trial ends, and until that delinquency exceeds 120 days. This would provide borrowers who become delinquent again time to complete an application and be reviewed for all loss mitigation options before foreclosure can be initiated.

Additionally, the Bureau notes that servicers must still comply with the requirements of § 1024.41 for the first loss mitigation application submitted after acceptance of a loan modification offered pursuant to proposed § 1024.41(c)(2)(vi)(A), due to § 1024.41(i)’s requirement that a servicer comply with § 1024.41 if a borrower submits a loss mitigation application, unless the servicer has previously complied with the requirements of § 1024.41 for a complete application submitted by the borrower and the borrower has been delinquent at all times since submitting that complete application. The proposed exception

described under new § 1024.41(c)(2)(vi) would only apply to offers based on the evaluation of an incomplete loss mitigation application. Regardless of whether the loan modification is finalized and therefore resolves any preexisting delinquency, a servicer would be required to comply with all of the provisions of § 1024.41 with respect to the first subsequent application submitted by the borrower after the borrower accepts an offer under proposed § 1024.41(c)(2)(vi).

Additionally, servicers may be required to comply with early intervention obligations if a borrower’s mortgage loan account remains delinquent after a loan modification is offered and accepted under proposed § 1024.41(c)(2)(vi)(A) (such as when a borrower is in a trial loan modification plan) or becomes delinquent after a loan modification under proposed § 1024.41(c)(2)(vi)(A) is finalized.<sup>118</sup> These include live contact and written notification obligations that, in part, require servicers to inform borrowers of the availability of additional loss mitigation options and how the borrowers can apply.<sup>119</sup>

The Bureau solicits comment on all aspects of proposed § 1024.41(c)(2)(vi)(A)(4).

## 41(c)(2)(vi)(B)

Section 1024.41(b)(1) generally requires that a servicer exercise reasonable diligence to complete any loss mitigation application submitted 45 days or more before a foreclosure sale, and § 1024.41(b)(2) requires a servicer to review such an application and assess its completeness, and to send the written notice described in § 1024.41(b)(2) in connection with such an application. Proposed § 1024.41(c)(2)(vi)(B) would offer servicers relief from these regulatory requirements when a borrower accepts a loan modification under proposed § 1024.41(c)(2)(vi)(A), but would require a servicer to immediately resume reasonable diligence efforts as required under § 1024.41(b)(1) with regard to any loss mitigation application the borrower submitted before the servicer’s offer of the trial loan modification plan if the borrower fails to perform under a trial loan modification plan offered pursuant

<sup>118</sup> Small servicers, as defined in Regulation Z, 12 CFR 1026.41(e)(4), are not subject to these requirements. 12 CFR 1024.30(b)(1).

<sup>119</sup> See 12 CFR 1024.39(a) and (b). Also, servicers generally must have policies and procedures in place to advise borrowers of all of their loss mitigation options. 12 CFR 1024.38. During the COVID-19 emergency, one of the loss mitigation options to be presented to borrowers with federally backed mortgages is their right to CARES Act forbearance.

<sup>117</sup> 12 CFR 1024.41(f)(1).

to proposed § 1024.41(c)(2)(vi)(A) or if the borrower requests further assistance.

The protections in § 1024.41(b)(1) and (2) are part of a regulatory regime designed to ensure that borrowers generally receive an evaluation for all available loss mitigation options based upon a single application. This regulatory regime generally is intended to ensure that borrowers have a full information about their loss mitigation options before deciding on a program.<sup>120</sup> It also makes the loss mitigation application process more efficient by eliminating multiple, sequential evaluations that are sometimes based on similar application information, with the resulting efficiency often saving borrowers time and resources.<sup>121</sup>

As further discussed above, the Bureau believes that the requirements of § 1024.41(b)(1) and (2) may not be necessary to protect borrowers in the limited context of a loan modification offered under proposed § 1024.41(c)(2)(vi)(A). Servicers will be dealing with an abnormally high number of requests for loss mitigation assistance due to the pandemic. If servicers were required to exercise reasonable diligence to obtain a complete application for each of these borrowers when they exit forbearance programs, as generally required under § 1024.41(b)(1), or to provide borrower-specific notifications of the documents and information each individual applicant must submit to complete the application, as required under § 1024.41(b)(2), it would likely interfere with their ability to provide effective, efficient, and accurate assistance. And borrowers dealing with the social and economic effects of the COVID-19 emergency may be less likely than normal to take the steps necessary to complete a loss mitigation application to receive a full evaluation.

The Bureau notes that, if a borrower does wish to pursue a complete application and receive the full protections of § 1024.41, proposed § 1024.41(c)(2)(vi) would not prohibit them from doing so. In addition, as discussed in the section-by-section analysis of § 1024.41(c)(2)(vi)(A)(4), the Bureau stresses that servicers would be required to comply with § 1024.41, including § 1024.41(b)(1) and (2), if the borrower submits a new loss mitigation application after accepting a loan modification under proposed § 1024.41(c)(2)(vi)(A).

Additionally, servicers may be required to comply with early intervention obligations if a borrower's mortgage loan account becomes delinquent after a loan modification takes effect or remains delinquent due to, for example, being in a trial loan modification plan, after a borrower accepts an offer under proposed § 1024.41(c)(2)(vi)(A). Further, the Bureau believes that a borrower whose mortgage loan account becomes delinquent or remains delinquent after acceptance of a loan modification under proposed § 1024.41(c)(2)(vi)(A) will have sufficient notice that other options may be available should the borrower wish to submit another application. In general, borrowers who previously entered into a forbearance program will have received at least two written notifications earlier in the loss mitigation process, as required under Regulation X: (1) The written notice required under § 1024.41(b)(2) when the borrower submits the initial application requesting a forbearance program, and (2) written notification of the terms and conditions of the forbearance program, required under § 1024.41(c)(2)(iii), stating that the servicer offered the program based on evaluation of an incomplete application, that other loss mitigation options may be available, and that the borrower still has the option to submit a complete application to receive an evaluation for all available options.

Additionally, many borrowers who would receive an offer under proposed § 1024.41(c)(2)(vi)(A) are likely to have received early intervention efforts by their servicers, including the written notice required under Regulation X stating, among other things, a brief description of examples of loss mitigation options that may be available, as well as application instructions or a statement informing the borrower about how to obtain more information about loss mitigation options from the servicer.

In light of these protections, as well as the safeguards set forth in proposed § 1024.41(c)(2)(vi)(A), the Bureau believes that the requirements of § 1024.41(b)(1) and (2) may not be necessary to protect borrowers in this limited context. Proposed § 1024.41(c)(2)(vi)(B) would therefore generally provide that a servicer is not required to comply with § 1024.41(b)(1) or (2)'s requirements with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the loan modification described in proposed § 1024.41(c)(2)(vi)(A).

#### Trial Loan Modifications

As discussed above, to be eligible for the proposed exception to the anti-evasion requirement under § 1024.41(c)(2)(vi), proposed § 1024.41(c)(2)(vi)(A)(4) would require that either the borrower's acceptance of a loan modification offer must end any preexisting delinquency on the mortgage loan, or a loan modification offered must be designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification. In most cases, borrowers must be more than 120 days delinquent before a servicer may refer a loan to foreclosure.<sup>122</sup> Thus, if a borrower wishes to pursue another loss mitigation option after the borrower's preexisting delinquency ends upon their acceptance of an offer under § 1024.41(c)(2)(vi)(A), the borrower will still have a considerable amount of time to complete a loss mitigation application before they would be at risk for foreclosure.<sup>123</sup>

The Bureau understands that certain loan modification options, such as the flex modifications offered by the GSEs, require that a borrower complete a trial loan modification plan before the loan modification is finalized and a borrower's delinquency ends. Borrowers seeking this type of loan modification who are more than 120 days delinquent would likely remain so during the trial period, and thus would not be protected under § 1024.41(f)(1)(i)'s prohibition on foreclosure referral during a trial loan modification plan. However, limiting the proposed exception to the anti-evasion requirement in § 1024.41(c)(2)(vi) to loan modification options that bring the borrower current upon acceptance of the offer would exclude flex modifications requiring trial loan modification plans offered by the GSEs, a result that would limit the scope of the proposed new exception too narrowly.

The Bureau seeks to ensure that borrowers are not harmed by a loan modification offer that requires the completion of a trial loan modification

<sup>122</sup> 12 CFR 1024.41(f)(1).

<sup>123</sup> Similarly, to be eligible for the current exception to the anti-evasion requirement under § 1024.41(c)(2)(v)(A), established in the June 2020 IFR, a loss mitigation option such as a deferral must bring the loan current. Thus, if a borrower wishes to pursue another loss mitigation option after accepting a deferral offered under current § 1024.41(c)(2)(v)(A), the borrower will still have a considerable amount of time to complete a loss mitigation application before the servicer could make the first notice or filing.

<sup>120</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10827-28.

<sup>121</sup> *Id.*

plan before ending any preexisting delinquency on the mortgage loan account. Specifically, the Bureau wants to ensure that, if those borrowers failed to perform under a trial loan modification plan, they would still have sufficient opportunity to complete an application and be reviewed for all loss mitigation options before foreclosure can be initiated. To achieve this goal, the Bureau is proposing to require the resumption of reasonable diligence efforts if a borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or if a borrower requests further assistance.

The Bureau believes it may be appropriate that a borrower who fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) should be provided with an opportunity to complete an application that they began before the trial loan modification plan, so that the borrower can be expeditiously reviewed for all available loss mitigation options.<sup>124</sup> It also may be appropriate that a borrower who contacts a servicer during a trial loan modification plan for further loss mitigation assistance, even if the borrower has not yet failed to perform under a trial loan modification plan, should be provided with an opportunity to complete an incomplete application that they submitted before the trial loan modification plan, so that the borrower can be expeditiously reviewed for all available loss mitigation options. For that reason, the Bureau is proposing to require a servicer to immediately resume reasonable diligence efforts as required under § 1024.41(b)(1) with regard to any incomplete loss mitigation application a borrower submitted before the servicer's offer of the trial loan modification plan if the borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or if the borrower requests further assistance.

As noted above, borrowers seeking a loan modification who are more than 120 days delinquent would likely remain so during the trial period, and thus would not be protected during a trial loan modification plan under § 1024.41(f)(1)'s prohibition on foreclosure referral. The Bureau recognizes that providing additional foreclosure referral protections for borrowers who accept a trial loan

modification plan under proposed § 1024.41(c)(2)(vi)(A) may dissuade servicers from offering streamlined loan modifications that require the successful completion of a loan modification trial period. The Bureau solicits comment on whether additional foreclosure referral protection is appropriate in these circumstances, on the most effective ways to achieve this additional protection, and to what extent this additional protection may be necessary if the Bureau were to finalize the special COVID-19 Emergency pre-foreclosure review period discussed in the below section-by-section analysis of § 1024.41(f). The Bureau has considered, for example, restricting foreclosure for a certain period of time for a borrower who accepts a trial loan modification plan under proposed § 1024.41(c)(2)(vi)(A) or altering the definition of delinquency such that a borrower's delinquency would end for purposes of § 1024.41(f)(1)(i)'s prohibition on foreclosure referral when a borrower accepts a trial loan modification plan under proposed § 1024.41(c)(2)(vi)(A).

The Bureau also solicits comment on all other aspects of proposed § 1024.41(c)(2)(vi)(B), including offering servicers relief from the regulatory requirements in § 1024.41(b)(1) and (b)(2) when a borrower accepts a loan modification under proposed § 1024.41(c)(2)(vi)(A), and requiring a servicer to immediately resume reasonable diligence efforts under § 1024.41(b)(1) with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the trial loan modification plan if the borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or if the borrower requests further assistance.

#### 41(f) Prohibition on Foreclosure Referral

Section 1024.41(f) prohibits a servicer from referring a borrower to foreclosure in certain circumstances. Specifically, § 1024.41(f)(1) prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, unless the borrower's mortgage loan obligation is more than 120 days delinquent, the foreclosure is based on a borrower's violation of a due-on-sale clause, or the servicer is joining the foreclosure action of a superior or subordinate lienholder. Regulation X generally refers to this prohibition as a pre-foreclosure review period.

The Bureau adopted § 1024.41(f)(1) to address the potentially substantial harm to borrowers who may occur when

servicers commence a foreclosure proceeding before the borrower has had a meaningful opportunity to submit a loss mitigation application or while a complete loss mitigation application is pending.<sup>125</sup> Harms from undertaking these processes simultaneously, known as dual tracking, include potentially avoidable foreclosure costs and fees and consumer confusion from receiving inconsistent communications, which might lead borrowers not to complete loss mitigation processes or impede borrowers' ability to identify errors by servicers reviewing loss mitigation applications. In the 2013 RESPA Servicing Final Rule, the Bureau, therefore, concluded that a servicer generally should not be permitted to begin the foreclosure process when there is a pending complete loss mitigation application and explained that including such a general prohibition in that rule, unless coupled with a restriction on when the foreclosure process can begin, might incentivize servicers to begin the foreclosure process earlier than would otherwise occur to avoid delay resulting from the submission of a complete loss mitigation application.<sup>126</sup> Accordingly, the Bureau included both the general prohibition and the foreclosure referral timing restriction in the 2013 RESPA Servicing Final Rule.

Section 1024.41 generally does not apply to small servicers.<sup>127</sup> However, the pre-foreclosure review period in § 1024.41(f)(1) does apply to small servicers.<sup>128</sup>

#### The Proposal

The Bureau is proposing to revise § 1024.41(f) to provide a special COVID-19 Emergency pre-foreclosure review period (the "special pre-foreclosure review period") that generally would prohibit servicers from making a first notice or filing from the effective date of the rule until after December 31, 2021. This restriction would be in addition to existing § 1024.41(f)(1)(i), which prohibits a servicer from making the first notice or filing required by applicable law until a borrower's mortgage loan obligation is more than 120 days delinquent. The Bureau is also seriously considering exemptions from this proposed restriction that would permit servicers to make the first notice or filing before December 31, 2021, if the servicer (1) has completed a loss mitigation review of the borrower and

<sup>124</sup> 12 CFR 1024.41(c)(1)(i) generally requires that a servicer evaluate a borrower for all loss mitigation options available to the borrower if the servicer receives a complete loss mitigation application more than 37 days before a scheduled foreclosure sale.

<sup>125</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10833.

<sup>126</sup> *Id.*

<sup>127</sup> 12 CFR 1024.30(b)(1).

<sup>128</sup> 12 CFR 1024.41(j).

the borrower is not eligible for any non-foreclosure option or (2) has made certain efforts to contact the borrower and the borrower has not responded to the servicer's outreach. Like the current restrictions, the special pre-foreclosure review period would only apply to mortgage loans secured by a borrower's principal residence.

If adopted, this special pre-foreclosure review period should help ensure that every borrower who is experiencing a delinquency between the time the rule becomes final until the end of 2021, regardless of when the delinquency first occurred, will have sufficient time in advance of foreclosure referral to pursue foreclosure avoidance options with their servicer. Ensuring borrowers have sufficient time before foreclosure referral should, in turn, help to avoid the harms of dual tracking, including unwarranted or unnecessary costs and fees, and other harm when a potentially unprecedented number of borrowers may be in need of loss mitigation assistance at around the same time later this year after the end of forbearance periods and foreclosure moratoria.

As explained in part II above, the current crisis has brought about extraordinary hardships for borrowers across the country. Many borrowers have been offered relief through forbearance or other short-term loss mitigation options based on an incomplete application, or without the submission of any loss mitigation application. Likewise, foreclosure moratoria on most mortgages have ensured that even borrowers who have not taken advantage of any loss mitigation options have been able to remain in their homes during the current crisis. However, the foreclosure moratoria that apply to most mortgages are scheduled to end in late June 2021. In addition, most borrowers with loans in forbearance programs as of the publication of this proposed rule are expected to reach the maximum term of 18 months in forbearance available for federally backed mortgage loans between September and November of this year and will likely be required to exit their forbearance program at that time. These expirations could trigger a sudden and sharp increase in loss mitigation-related default servicing activity at around the same time because many of these borrowers have not yet pursued or been reviewed for available loss mitigation options. In addition, because forbearance generally does not pause the homeowner's underlying delinquency, many of these borrowers will be more than 120 days delinquent when exiting their forbearance

program.<sup>129</sup> Thus, it is possible that a servicer may refer a loan to foreclosure soon after forbearance ends, before borrowers have an opportunity to pursue foreclosure avoidance options, unless a foreclosure moratorium or other restriction is in place or the borrower brings their accounts current. Among other concerns, this could cause borrower harm from potential dual tracking.

Borrowers exiting forbearance programs may be eligible for one or more loss mitigation options, and the options added in the Bureau's June 2020 IFR and in proposed § 1024.41(c)(2)(vi) facilitate a borrower's transition back to current status in certain circumstances. However, those circumstances may not be available to every borrower. For the reasons described herein, the Bureau is concerned that borrowers and servicers may both need additional time before foreclosure referral in the months ahead to ensure borrowers have a meaningful opportunity to pursue foreclosure avoidance options consistent with the purposes of RESPA. Many community groups and Members of Congress have expressed similar concerns and urged the Bureau to take action, highlighting for example that borrowers are unlikely to understand how quickly foreclosure could begin after exiting their forbearance program.<sup>130</sup>

Servicers should be in a much better position to handle the increased volume of default servicing at this time than they were during the 2008 crisis because legal requirements are clearer, processes have generally improved, and servicers have had time to predict and plan for additional staffing needed to handle the increased volume. Despite this, servicers faced significant challenges responding to the rapidly evolving situation last year,<sup>131</sup> and the Bureau is concerned that servicers may face similar challenges again later this year. Given the potentially unprecedented nature of the situation (as discussed herein), it may have been impossible to predict the staffing and training needed to properly assist the volume of severely delinquent borrowers exiting their forbearance programs later this year who may need help determining how to avoid foreclosure.

A lack of adequately trained staff during the anticipated deluge of loss mitigation activity could harm borrowers in multiple ways. For example, servicers may not have adequate resources to meet reasonable

diligence obligations under § 1024.41(c)(4) or may inadvertently provide inaccurate information regarding a borrower's options or the materials needed to complete a loss mitigation application. As another example, it may take servicers longer to process application information submitted by borrowers due to the volume of incoming application information at the same time. As a result, it is possible that a servicer may erroneously refer a loan to foreclosure in violation of Regulation X,<sup>132</sup> not recognizing that the borrower has submitted a complete loss mitigation application or that the servicer has otherwise interfered with the borrower's ability to pursue a foreclosure avoidance option. These errors could lead to additional fees associated with the borrower's delinquency or foreclosure referral that would not have been incurred absent the servicer's failures. These risks could be further exacerbated if any servicing transfers were to occur during this period.<sup>133</sup>

Further, the combination of evolving requirements, new staff, and the high volume of severely delinquent borrowers could cause error rates associated with the servicing of delinquent borrowers to increase, even for servicers with otherwise strong compliance management systems. Given the volume of borrowers who may be facing a heightened risk of foreclosure referral, even a small error rate could lead to many borrowers experiencing harm. The Bureau expects servicers to have in place appropriate staffing and monitoring systems to identify and correct such errors. However, the Bureau is concerned that, during this potentially unparalleled COVID-19 emergency, servicers may not be able to identify or correct errors that may lead them to make foreclosure referrals

<sup>132</sup> See 12 CFR 1024.41(f)(2).

<sup>133</sup> The Bureau has expressed concerns about potential harms to borrowers who can result when mortgage servicing is transferred. See, e.g., Bureau of Consumer Fin. Prot., *Consumer Financial Protection Bureau Outlines Mortgage Loan Transfer Process to Prevent Consumer Harm* (Apr. 24, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-outlines-mortgage-loan-transfer-process-prevent-consumer-harm/> (noting that the Bureau "has found weakness in how some servicers manage mortgage servicing transfers"); 81 FR 72160, 72273 (Oct. 19, 2016) ("The Bureau has always believed that there is a risk of borrower harm in the context of servicing transfers."); Bureau of Consumer Fin. Prot., *Compliance bulletin and policy guidance re: Mortgage servicing transfers* (Aug. 19, 2014), <https://www.consumerfinance.gov/compliance/supervisory-guidance/bulletin-mortgage-servicing-transfers/>; 79 FR 63295, 63296 (Oct. 23, 2014) ("There is heightened risk inherent in transferring loans in loss mitigation, including the risk that documents and information are not accurately transferred.").

<sup>129</sup> See *supra* note 61 and accompanying text.

<sup>130</sup> See *supra* note 88.

<sup>131</sup> Housing Insecurity Report, *supra* note 11, at 5-9.



erroneously. Allowing servicers to proceed with foreclosure according to investor requirements, which often set a deadline for making the first notice or filing,<sup>134</sup> in these circumstances could cause harm to a large number of borrowers if they are not able to meaningfully pursue foreclosure avoidance options because of servicer errors. As a result, the Bureau believes that it is appropriate to impose a special pre-foreclosure review period that would give servicers time to complete compliance reviews, identify and correct any errors, and ensure that they can accurately respond to the potentially unprecedented volume of borrowers in need of assistance at around the same time. If the Bureau were to allow the first notice or filing to occur with respect to these loans during the special pre-foreclosure review period, borrowers may suffer harms associated with, among other things, dual tracking.

In addition to servicer-related concerns, the Bureau is also concerned that borrowers may encounter obstacles during this period and may need additional time before foreclosure referral to consider foreclosure avoidance options. Regulation X currently requires servicers to reach out to these borrowers regarding loss mitigation options, and to exercise reasonable diligence to obtain and timely evaluate complete loss mitigation applications.<sup>135</sup> This proposal seeks to bolster these consumer protections.

The available evidence and early outreach suggest that the present circumstances may have so interfered with a borrower's ability to obtain and understand important information regarding the status of their loans and foreclosure avoidance that immediately subjecting them to foreclosure proceedings upon exiting forbearance or losing the protection of a foreclosure moratorium risks denying them a meaningful opportunity to be reviewed for potential foreclosure avoidance options available to them. For example, borrowers may have received outdated or incorrect information that could delay their requests for loss mitigation options, or they may have delayed such requests because they did not understand the risk of foreclosure due to potentially historically long forbearance periods and lengthy foreclosure moratoria. Indeed, the long forbearance and moratoria periods in the

circumstances of the pandemic may have led borrowers to defer consideration of their long-term ability to meet their monthly mortgage payment obligations in favor of short-term needs concerning health, childcare, and lost wages. Many borrowers also may not have taken steps to address their delinquency because they expected that the foreclosure moratoria would be extended again or that they would have another the opportunity to extend their forbearance. The Bureau believes that such expectations are understandable given repeated extensions of the same throughout the current economic and health crisis. The current crisis also may have created unique obstacles, such as physical barriers preventing borrowers from obtaining documentation required to complete a loss mitigation application, which may have significantly undermined borrower ability to address their delinquencies sooner. Without additional regulatory intervention now, some investors may require servicers to proceed with the foreclosure process before some borrowers obtain a meaningful opportunity to seek and be considered for potential foreclosure avoidance options.

To be sure, some borrowers may seek help at a slightly earlier date because of the proposed early intervention requirements described above in the section-by-section analysis of § 1024.39(e). That would be a good thing. But other borrowers may not do so for the reasons described herein or for other ongoing economic or health circumstances unique to the COVID-19 pandemic and the resulting economic crisis. This could lead to servicers making foreclosure referrals for a large number of borrowers before such borrowers have had an opportunity to meaningfully pursue foreclosure avoidance options. Allowing servicers to proceed with the first notice or filing in these circumstances, in turn, could lead to borrower harms similar to the harms that the 2013 RESPA Servicing Final Rule originally sought to address in § 1024.41(f) and that cannot be adequately remediated after the fact, including large fees associated with foreclosure referral even if the servicer ultimately does not proceed with the final foreclosure action.

To address these concerns, the Bureau is proposing to impose a special pre-foreclosure review period. Specifically, the Bureau is proposing to amend § 1024.41(f)(1)(i) to state that a servicer shall not make the first notice or filing unless a borrower's mortgage loan obligation is more than 120 days

delinquent and paragraph (f)(3) does not apply. The Bureau is also proposing to add new § 1024.41(f)(3) to provide that a servicer shall not rely on paragraph (f)(1)(i) to make the first notice or filing until after December 31, 2021. This would not impact a servicer's ability to rely on paragraph (f)(1)(ii) or (iii) to make the first notice or filing.

The Bureau solicits comments on every aspect of the proposed revisions to § 1024.41(f). The Bureau also seeks comments on specific issues relating to the proposed revisions, as discussed below.

#### *Potential Exemptions*

The Bureau believes that it may be appropriate to adopt exemptions that would allow a servicer to make the first notice or filing before December 31, 2021, in certain circumstances where the special pre-foreclosure review period is unlikely to benefit borrowers or servicers. The Bureau solicits comments on two specific potential exemptions.

First, the Bureau believes that it may be appropriate to allow a servicer to make the first notice or filing before December 31, 2021, if the servicer has completed a loss mitigation review of the borrower and the borrower is not eligible for any non-foreclosure option or the borrower has declined all available options. As noted above, the purpose of the special pre-foreclosure review period is to ensure that borrowers and servicers have adequate time before foreclosure referral to offer and consider foreclosure avoidance options when volume may be historically high. The Bureau believes that these purposes may still be achieved if a servicer is permitted to make the first notice or filing before December 31, 2021, because the borrower has been fully evaluated for all available loss mitigation options and the borrower either does not qualify for any non-foreclosure options or declines all of them.

However, the Bureau is concerned that such an exemption could inadvertently prevent some borrowers from having an opportunity to meaningfully pursue foreclosure avoidance options before foreclosure referral. For example, the Bureau is concerned that such an exemption might not account for situations where a borrower's eligibility changes within a relatively short period of time, as may happen during this particular economic crisis, as certain businesses may begin to reopen or open more completely based on when different State and local jurisdictions make adjustments to their COVID-19-related restrictions.

<sup>134</sup> See, e.g., U.S. Dep't of Hous. and Urban Dev., *Mortgagee Letter 2021-05* (Feb. 16, 2021), <https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-05hsgml.pdf>.

<sup>135</sup> See generally 12 CFR 1024.39; 12 CFR 1024.41(b)(1).

Although § 1024.41(i) only requires a servicer to review a single complete loss mitigation application during a delinquency, § 1024.38(b)(2)(v) requires the servicer to implement policies and procedures to achieve the objective of reviewing borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan. As noted in the 2013 RESPA Servicing Final Rule, the Bureau understands from outreach that many owners or assignees of mortgage loans require servicers to consider material changes in financial circumstances in connection with evaluations of borrowers for loss mitigation options, and servicer policies and procedures must be designed to implement those requirements.<sup>136</sup> Thus, although § 1024.41(f) does not directly require a duplicative review if a borrower's financial circumstances change, the Bureau believes that any final rule should contemplate these concerns.

One approach to address this concern may be to limit any exemption such as that discussed above so that it only applies if the borrower has been evaluated for all available loss mitigation options after the effective date of this rule. This should help ensure that borrowers are not surprised to learn that they are no longer protected from foreclosure referral, while still allowing servicers to proceed with foreclosure if an extended review period will not benefit the borrower. The Bureau solicits comment on whether such an exemption should be finalized and whether the limitations discussed above would achieve the consumer protection purposes discussed herein.

Second, the Bureau also believes that it may be appropriate to allow a servicer to proceed with foreclosure if the servicer has exercised reasonable diligence to contact the borrower and has been unable to reach the borrower. If the Bureau were to finalize such an exemption, any final rule could define reasonable diligence, such as by basing it on similar concepts in the Home Affordable Modification Program. For example, reasonable diligence could include multi-modal communication attempts, such as, over a period of 30 days: (1) Making a minimum of four telephone calls to the last known phone numbers of record, at different times of the day; and (2) sending two written notices to the last address of record by sending one letter via certified/express mail or via overnight delivery service with return receipt/delivery

confirmation and one letter via regular mail.

The Bureau believes that it may be possible to adopt such an exemption without undermining the purposes of the proposed special pre-foreclosure review period because delaying the foreclosure referral for these borrowers may be unlikely to benefit them and making the first notice or filing could prompt communication. However, adopting this type of exemption could potentially lead to the exact harms this proposal seeks to limit, and some borrowers could be subject to dual tracking or foreclosure without being given a meaningful opportunity to consider foreclosure avoidance options. In particular, the Bureau is concerned that the same borrower-related concerns discussed above could also increase the likelihood that a borrower does not respond to servicer outreach. For example, a borrower who does not have an FHA mortgage loan may initially fail to respond to their servicer because they falsely believe that FHA's extended deadlines for first notice or filing apply to them. Borrowers may also fail to respond because they believe that physical limitations associated with the COVID-19 emergency would prevent them from obtaining the documents necessary to complete a loss mitigation application.

If the Bureau were to adopt this exemption, the Bureau would likely limit its scope so that it only applies if the servicer engages in reasonable diligence after the effective date of any final rule. Absent such a limitation, the concerns discussed herein may be exacerbated if servicers could proceed with foreclosure because the borrower failed to respond to servicer outreach before the effective date of this rule. The Bureau solicits comment on whether such an exemption would be appropriate, whether the exemption should only apply if reasonable diligence occurs after the effective date of this rule, and whether any such exemption should be further tailored to address these or other concerns.

#### *Length of the Special COVID-19 Emergency Pre-Foreclosure Review*

The Bureau is proposing generally to prohibit a servicer from making the first notice or filing until a date certain—December 31, 2021. The Bureau expects that ending the prohibition on December 31, 2021, may address the concerns discussed above in several ways. As explained above, the Bureau expects that a large number of borrowers who are currently in a forbearance program will be required to exit the program between September 1, 2021,

and November 30, 2021.<sup>137</sup> This may result in an unprecedented number of borrowers who need to be evaluated for other loss mitigation options at roughly the same time.

The proposed December 31, 2021 date certain is intended to give all delinquent borrowers additional time before foreclosure referral to pursue foreclosure avoidance options during the period of time when they are most likely to need additional assistance from their servicers and may face difficulties obtaining information necessary to complete applications. It is also intended to give servicers a reprieve from any investor mandates to proceed with foreclosure during the period when default servicing activity may be at unprecedented levels so that servicers can ensure they can operate in compliance with all legal and contractual requirements, including evolving rules adopted to respond to the current crisis, and correct any errors before they result in irremediable borrower harm.

The Bureau expects that ending the special pre-foreclosure review period on December 31, 2021, as opposed to a different date, will appropriately address these concerns because the volume of new borrowers needing default servicing assistance, especially after an extended forbearance, should significantly reduce after that date (most borrowers in forbearance will have been required to exit by the end of November). Thus, the Bureau expects that the December 31, 2021 date certain should give many borrowers who did not apply for loss mitigation earlier, or who only considered temporary options, sufficient time to meaningfully pursue foreclosure avoidance options after exiting extended forbearance and foreclosure moratoria periods and before foreclosure referral. In addition, the December 31, 2021 date should allow sufficient time for servicers to identify potential procedural problems (e.g., inadequate staff training) and fix them before making an erroneous first notice or filing instead of discovering them after foreclosure referral has already occurred. Further, to the extent that borrowers faced physical barriers to meaningful pursuit of foreclosure avoidance options, the Bureau hopes that those barriers will be reduced by December 31, 2021. Thus, fewer borrowers should be seeking loss mitigation by January 2022 and those who are should face fewer potential obstacles to applying for a loss mitigation option by that time as well.

<sup>136</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10836.

<sup>137</sup> Black Jan. 2021 Report, *supra* note 36.

The Bureau solicits comment on the potential benefits and implementation challenges associated with the proposed date certain approach. The Bureau also solicits comment on whether the proposed date certain—December 31, 2021—is the appropriate date. In particular, the Bureau seeks comment on whether the date certain should instead account for potential changes to foreclosure moratoria or forbearance program terms. For example, an alternative approach could tie the date certain to the last-announced forbearance extension made by FHFA or FHA so that the special pre-foreclosure review period ends a specified number of days after the last extension of forbearance programs or foreclosure moratoria.

#### *Potential Alternative Approaches*

The Bureau is proposing to end the special pre-foreclosure review period on a date certain rather than other alternatives because it believes the date certain approach may help to (1) ease compliance for the industry and (2) protect all delinquent borrowers who may need additional time to consider foreclosure alternatives before the initiation of foreclosure, regardless of whether they entered into a forbearance program or were delinquent before the crisis began. The Bureau currently believes that it would be more difficult for servicers to implement other potential interventions that the Bureau has considered thus far because compliance for those options would necessarily be tied to the facts of each loan and could overlap with other procedures that servicers already have in place. In addition, some other approaches may not provide protections for all borrowers who may need additional time to consider foreclosure avoidance options before the initiation of foreclosure.

However, the Bureau is seriously considering alternative interventions because it is also concerned about potential disadvantages to the proposed date certain approach that may not exist for other interventions. For example, the Bureau is concerned that the proposed date certain approach could unnecessarily increase costs to borrowers for whom foreclosure is not avoidable and reduce the equity that they have in their homes, while simultaneously increasing costs to servicers, which could exacerbate liquidity and reserve concerns. The proposed date certain approach without certain exceptions also would provide, at best, limited benefits to a delinquent borrower who never communicates with their servicer during this time, and it

would not provide any protection to a borrower who is referred to foreclosure before the effective date of the rule.

The proposed approach also could encourage some servicers to make the first notice or filing before any final rule becomes effective. The Bureau notes that, consistent with the April 1, 2021 Bulletin “Supervision and Enforcement Priorities Regarding Housing Insecurity,” it will be paying particular attention to heightened risks to consumers needing loss mitigation assistance in the coming months as the COVID-19 foreclosure moratoria and forbearances end.<sup>138</sup> In particular, as noted in the Compliance Bulletin, the Bureau intends to look at a servicer’s overall effectiveness at helping consumers manage loss mitigation, along with other relevant factors, when using its discretion to address violations of Federal consumer financial law in supervisory and enforcement matters.

Further, although the proposed date certain approach is straightforward, it could nevertheless impose costs on servicers to update their systems and add another layer of complexity to default servicing. The Bureau is also concerned that new State or Federal legislation or changes to investor requirements after issuance of this proposal could necessitate adjustments to the date specified or other amendments to the proposed provisions. This could render the proposal less effective and increase complexity.

The Bureau seeks comment on the potential limitations of the proposed date certain approach and on alternatives that could help to resolve these concerns. In particular, the Bureau requests comments on a “grace period” approach that would provide an additional foreclosure protection from the existing requirements starting when a borrower exits their forbearance program. Such an exemption could prohibit servicers from foreclosure referral until a certain number of days (e.g., 60 or 120 days) after a borrower exits their forbearance program. The Bureau has not proposed the grace period option, in part, because it currently believes the grace period option, which would require loan-specific analysis, would be more difficult for servicers to implement than the proposed date certain approach, which does not. The Bureau is also concerned that the grace period approach would not protect borrowers who never entered a forbearance program.

<sup>138</sup> See Supervision & Enforcement Housing Report, *supra* note 75.

The Bureau solicits comment on the potential benefits and implementation challenges associated with the alternative grace period approach, including whether such an approach would be more difficult to implement than the proposed approach. The Bureau also solicits comment on what may be an appropriate number of days for any such grace period if commenters believe that approach would be a preferable option.

The Bureau has also considered an approach keyed to the length of delinquency, such as temporarily extending the number of days a borrower must be delinquent before the servicer may make the first notice or filing. However, the Bureau is currently concerned that such an approach would provide shorter (or possibly no) protection for borrowers with delinquencies that began before the crisis because they could become eligible for foreclosure referral immediately or soon after exiting forbearance. The Bureau is also currently concerned that such an approach would also require a fact-specific analysis for each delinquent loan, which would add another layer of complexity for servicers to implement. The Bureau seeks comments on whether this approach may be preferable to the proposed date certain approach.

Finally, the Bureau specifically seeks comment on whether the extended review period should end on a date that is based on when a borrower’s delinquency begins or forbearance period ends, whichever occurs last. The Bureau believes this approach could ensure that a borrower, regardless of the specific facts and circumstances, has a meaningful opportunity to consider foreclosure avoidance options. However, the Bureau is currently concerned that this approach could be much more operationally complex and could increase the risk of error. The Bureau seeks comments on whether this approach may be preferable to the proposed date certain approach.

#### *Scope of the Special Pre-Foreclosure Review Period*

If adopted, the special pre-foreclosure review period would apply to all delinquent loans that are secured by the borrower’s principal residence, regardless of when the first delinquency occurred.

The Bureau initially concludes that the proposal should apply to all delinquent loans, regardless of when the delinquency first occurred, because the potential consumer harms addressed by the rule would exist for all delinquent borrowers, regardless of when they first

became delinquent. All such borrowers may have faced similar unprecedented circumstances that rendered current protections insufficient to ensure meaningful review for foreclosure avoidance. For example, if servicers do not have the capacity to handle the anticipated surge in default servicing volume toward the end of 2021, all delinquent borrowers who may become eligible for foreclosure referral later this year would be affected—even if they were more than 120 days delinquent before the crisis began. Further, borrowers could encounter difficulties submitting a complete loss mitigation application because of COVID-related issues, such as being unable to obtain required documentation that must be obtained in person, regardless of when they first became delinquent.

The Bureau solicits comments on this aspect of the proposed rule, including whether borrowers would be sufficiently protected if the special pre-foreclosure review period only applied to borrowers who first became delinquent in 2020 or 2021 or entered a forbearance program before the effective date of any final rule.

As noted in part I above, this proposal only applies to a mortgage loan that is secured by a property that is a borrower's principal residence.<sup>139</sup> If the borrower has abandoned the property securing the loan, depending on the facts and circumstances and applicable law, the property may no longer be the borrower's principal residence.<sup>140</sup>

#### *Small Servicers*

The proposed special pre-foreclosure review requirements would generally apply to the same mortgage loans that are subject to the pre-foreclosure review period in § 1024.41(f)(1). However, unlike the pre-foreclosure review period in § 1024.41(f)(1), the proposed special pre-foreclosure review period would not apply to small servicers. This is because small servicers are exempt from the requirements in § 1024.41, except with respect to § 1024.41(f)(1),<sup>141</sup> and the Bureau is proposing to add the special pre-foreclosure review period to § 1024.41(f)(3) instead of to

§ 1024.41(f)(1). As discussed in the 2013 RESPA Servicing Final Rule, the Bureau understands that small servicers are generally staffed using a “high touch” model of customer service that is designed to ensure loan performance and a strong reputation in local communities.<sup>142</sup> The Bureau also understands that small servicers generally only service loans they originated or hold on portfolio, such that they are less likely to be subject to investor requirements that would obligate them to move forward with foreclosure referral even if the servicer determines that further delaying foreclosure to give a borrower additional time to pursue foreclosure avoidance options is appropriate. As a result, the Bureau expects that the existing pre-foreclosure review period will sufficiently ensure that such borrowers have a meaningful opportunity to pursue foreclosure avoidance before the initiation of foreclosure.

The Bureau seeks comment on this proposed approach.

#### **V. Proposed Effective Date**

The Bureau proposes that any final rule relating to this proposal take effect on or before August 31, 2021, and at least 30 days, or if it is a major rule, at least 60 days, after publication of a final rule in the **Federal Register**. As of the proposed effective date of the final rule, servicers would be subject to the proposed amendments for all actions taken on or after the effective date.

As discussed more fully in part II, many of the protections available to homeowners as a result of measures to protect them from foreclosure during the COVID-19 emergency are ending in the coming months. The Bureau, therefore, anticipates working quickly to issue any final rule relating to this proposal as soon as possible after receiving and evaluating public comment, and at least 30 days before August 31, 2021. The Bureau requests comment on all aspects of this proposed effective date. The Bureau has heard concerns in the past that midweek effective dates can create operational challenges for mortgage servicers, who may prefer to have the weekend immediately before an effective date to update and test their systems. The Bureau seeks comment on whether there is a day of the week or time of the month that would best facilitate the implementation of the proposed changes.

<sup>142</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10843.

#### **VI. Dodd-Frank Act Section 1022(b) Analysis**

##### *A. Overview*

In developing the proposed rule, the Bureau has considered the proposed rule's potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act.<sup>143</sup> The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts. In developing the proposed rule, the Bureau has consulted or offered to consult with the appropriate prudential regulators and other Federal agencies, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies, as required by section 1022(b)(2)(B) of the Dodd-Frank Act.

##### *B. Data Limitations and Quantification of Benefits, Costs, and Impacts*

The discussion below relies on information that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources, including reports published by the Bureau. These sources form the basis for the Bureau's consideration of the likely impacts of the proposed rule. The Bureau provides estimates, to the extent possible, of the potential benefits and costs to consumers and covered persons of this proposal given available data. However, as discussed further below, the data with which to quantify the potential costs, benefits, and impacts of the proposed rule are generally limited.

In light of these data limitations, the analysis below generally includes a qualitative discussion of the benefits, costs, and impacts of the proposed rule. General economic principles and the Bureau's expertise in consumer financial markets, together with the limited data that are available, provide insight into these benefits, costs, and impacts. The Bureau requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed rule.

##### *C. Baseline for Analysis*

In evaluating the benefits, costs, and impacts of the proposal, the Bureau

<sup>143</sup> Specifically, § 1022(b)(2)(A) of the Dodd-Frank Act requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services; the impact of proposed rules on insured depository institutions and insured credit unions with less than \$10 billion in total assets as described in § 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

<sup>139</sup> 12 CFR 1024.30(c)(2).

<sup>140</sup> Stakeholders over the years have urged the Bureau to expressly exempt abandoned properties from the foreclosure restrictions in the rules. The Bureau has considered expressly exempting abandoned properties from the pre-foreclosure review period in § 1024.41(f) but declined to do so, expressing concerns that such an exemption would require a fact-specific analysis and could be used to circumvent the 120-day prohibition for borrowers who are also delinquent. 78 FR 60381, 60406–07 (Oct. 1, 2013); 81 FR 72160, 72913, 72915 (Oct. 19, 2016).

<sup>141</sup> 12 CFR 1024.30(b)(1) and 1024.41(j).

considers the impacts of this proposal against a baseline in which the Bureau takes no action. This baseline includes existing regulations and the current state of the market. Further, the baseline includes, but is not limited to, the CARES Act and any new or existing forbearances granted under the CARES Act and substantially similar programs.

The baseline reflects the response and actions taken by the Bureau and other government agencies and industry in response to the COVID-19 pandemic and related economic crisis, which may change. Protections for mortgage borrowers, such as forbearance programs, foreclosure moratoria, and other consumer protections and general guidance, have evolved since the CARES Act was signed into law on March 27, 2020. It is reasonable to believe that the state of protections for mortgage borrowers will continue to evolve. For purposes of evaluating the potential benefits, costs, and impacts of the proposal, the focus is on a baseline that reflects the current and existing state of protections for mortgage borrowers. Where possible, the analysis includes a discussion of how estimates might change in light of changes in the state of protections for mortgage borrowers.

#### *D. Potential Benefits and Costs to Consumers and Covered Persons*

This section discusses the benefits and costs to consumers and covered persons of (1) the proposed special pre-foreclosure review period (proposed § 1024.41(f)); (2) the proposed new exception to the complete application requirement (proposed § 1024.41(c)); and (3) the proposed clarifications of the early intervention live contact and reasonable diligence requirements (proposed §§ 1024.39(a) and 1024.41(b)(1)).

##### 1. Prohibition on Foreclosure Referral

The proposed amendments to Regulation X would temporarily establish a special pre-foreclosure review period that would generally prohibit servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless such first notice or filing is made after December 31, 2021. This restriction would be in addition to existing § 1024.41(f)(1)(i), which prohibits a servicer from making the first notice or filing required by applicable law until a borrower's mortgage loan obligation is more than 120 days delinquent. The proposed amendment would not apply to small servicers.

##### Benefits and Costs to Consumers

The proposed provision would provide benefits and costs to consumers by providing consumers additional time for meaningful review of loan modification and loss mitigation options that help the borrower prevent avoidable foreclosure. The benefits and costs of this additional time for review can be measured by actual avoidance of foreclosure.

In the context of the COVID-19 pandemic and related economic crisis, a very large number of mortgage loans may be at risk of foreclosure. Generally, a servicer can initiate the foreclosure process once a borrower is more than 120 days delinquent, as long as no other limitations apply. In response to the current economic crisis, there are existing forbearance programs and foreclosure moratoria in place that prevent servicers from initiating the foreclosure process. As currently stands, Federal foreclosure moratoria are in effect until June 30, 2021. This means that some borrowers not in a forbearance plan may be at heightened risk of referral to foreclosure soon after the foreclosure moratoria end if they do not resolve their delinquency or reach a loss mitigation agreement with their servicer. Among borrowers in a forbearance plan, estimates indicate that a significant number of borrowers will have been in a forbearance program for 12 months in February (160,000) and March (600,000) of 2021.<sup>144</sup> If these borrowers remain in a forbearance program for the maximum amount of time (currently 18 months), then the forbearance program will end in September 2021. Other borrowers who were part of the initial, large wave of forbearances that began in April through June of 2020 will see their 18-month period end in October or November of 2021. These loans may be considered more than 120 days delinquent for purposes of Regulation X even if the borrower entered into a forbearance program, allowing the servicer to initiate foreclosure proceedings for these borrowers as soon as the forbearance program ends in accordance with existing regulations.<sup>145</sup> As proposed, the effective date of the proposed rule is expected to be August 31, 2021. Thus, the proposed rule should reduce foreclosure risk for the large number of borrowers who are expected to exit forbearance between September and November of 2021.

The primary benefit to consumers from this proposed provision would

arise from a reduction in foreclosure and its associated costs. There are a number of ways a borrower who is delinquent on their mortgage may resolve the delinquency without foreclosure. The borrower may be able to prepay by either refinancing the loan or selling the property. The borrower may be able to become current without assistance from the servicer ("self-cure"). Or, the borrower may be able to work with the servicer to resolve the delinquency through a loan modification or other loss mitigation option. Resolving the delinquency in one of these ways, if possible, will generally be less costly to the borrower than foreclosure. Even after foreclosure is initiated, a borrower may be able to avoid a foreclosure sale by resolving their delinquency in one of these ways, although a foreclosure action is likely to impose additional costs and may make some of these resolutions harder to achieve. For example, a borrower may be less likely to obtain an affordable loan modification if the administrative costs of foreclosure are added to the existing unpaid balance of the loan.<sup>146</sup> By providing borrowers with additional time before foreclosure can be initiated, the proposed provision would give borrowers a better opportunity to avoid foreclosure altogether.

To quantify the benefit of the proposed provision from a reduction in foreclosures sales, the Bureau would need to estimate (1) the average benefit to consumers, in dollar terms, of preventing a single foreclosure and (2) the number of foreclosures that would be prevented by the proposed provision. Given data currently available to the Bureau and information publicly accessible, a reliable estimate of these figures is difficult due to the significant uncertainty in economic conditions, evolving state of government policies, and elevated levels of forbearance and delinquency. Below, the Bureau outlines available evidence on the average benefit to preventing foreclosure and the number of foreclosures that could be prevented under the proposed provision.

Importantly, the Bureau notes that any evidence used in the estimation of the benefits to borrowers of avoiding foreclosure, generally, comes from earlier time periods that differ in many

<sup>144</sup> See Black Jan. 2021 Report, *supra* note 36 at 11.

<sup>145</sup> See *supra* note 61 and accompanying text.

<sup>146</sup> In addition, the Bureau has noted in the past that consumers may be confused if they receive foreclosure communications while loss mitigation reviews are ongoing, and that such confusion potentially may lead to failures by borrowers to complete loss mitigation processes, or impede borrowers' ability to identify errors committed by servicers reviewing applications for loss mitigation options. 2013 RESPA Servicing Final Rule, *supra* note 13, at 10832.

and significant ways from the current economic crisis. In the decade preceding the current crisis, the economy was not in distress. There was significant economic growth that included rising house prices, low rates of mortgage delinquency and forbearance, and falling interest rates. The current economic crisis also differs in substantive ways compared to the last recession from 2008 to 2009. In particular, housing markets have remained strong throughout the crisis. House prices have increased almost 7 percent year-over-year as of January 2021, whereas house prices plummeted between 2008 and 2009.<sup>147</sup> These differences make the available data a less reliable guide to likely near-term trends and generate substantial uncertainty in the quantification of the benefits of avoiding foreclosure for borrowers. The Bureau must make a number of assumptions to provide reasonable estimates of the benefit to consumers of the proposed provision, any of which can lead to significant under or overestimation of the benefits. The Bureau requests comment on all of the assumptions made to quantify the benefit to consumers, including comment on any available data that can be used in the quantification.

Estimates of the cost of foreclosure to consumers are large and include both significant monetary and non-monetary costs, as well as costs to both the borrower and non-borrowers. The Department of Housing and Urban Development (HUD) estimated in 2010 that a borrower's average out-of-pocket cost from a completed foreclosure was \$10,300, or \$12,500 in 2021 dollars.<sup>148</sup> This figure is likely an underestimate of the average borrower benefit of avoiding foreclosure. First, this estimate relies on data from before the 2000s, which may be difficult to generalize to the current period. Second, there are non-monetary costs to the borrower of foreclosure that are not included in the estimate. These may include but are not limited to,

increased housing instability, reduced homeownership, financial distress (including increased delinquency on other debts),<sup>149</sup> and adverse medical conditions.<sup>150</sup> Although the Bureau is not aware of evidence that would permit quantification of such borrower costs, they may be larger on average than the out-of-pocket costs. Third, there may be non-borrower costs that are unaccounted for, which can affect both individual consumers or families and the greater community. For example, research using data from earlier periods has found that foreclosure sales reduce the sale price of neighboring homes by 1 to 1.6 percent.<sup>151</sup> The HUD study referenced above estimates the average effect of foreclosure on neighboring house values at \$14,531 based on research from 2008 or earlier. Therefore, the Bureau believes that \$12,500 is likely a significant underestimate of the average benefit to preventing foreclosure.

Furthermore, during the COVID-19 pandemic and associated economic crisis, the cost of foreclosure for some borrowers may be even larger than the expected average cost of foreclosure more generally. Housing insecurity presents health risks during the pandemic that would otherwise be absent and that could continue to be present even if foreclosure is not completed for months or years.<sup>152</sup> In addition, searching for new housing may be unusually difficult as a result of the pandemic and associated restrictions. Recent analysis has shown that the pandemic has had disproportionate economic impacts on communities of color. For example,

<sup>149</sup> Rebecca Diamond *et al.*, *The Effect of Foreclosures on Homeowners, Tenants, and Landlords*, (Nat'l Bureau of Econ. Res., Working Paper No. 27358, 2020), <https://www.nber.org/papers/w27358>.

<sup>150</sup> One study estimated that, on average, a single foreclosure is associated with an increase in urgent medical care costs of \$1,974. The authors indicate that a significant portion of this cost may be attributed to distressed homeowners although some may be due to externalities imposed on the general public. See Janet Currie *et al.*, *Is there a link between foreclosure and health?* 7 *a.m. Econ. Rev.* 63 (2015), <https://www.aeaweb.org/articles?id=10.1257/pol.20120325>.

<sup>151</sup> See, e.g., Elliott Anenberg *et al.*, *Estimates of the Size and Source of Price Declines Due to Nearby Foreclosures*, 104 *a.m. Econ. Rev.* 2527 (2014), <https://www.aeaweb.org/articles?id=10.1257/aer.104.8.2527>; Kristopher Gerardi *et al.*, *Foreclosure Externalities: New Evidence*, 87 *J. of Urban Econ.* 42 (2015), <https://www.sciencedirect.com/science/article/pii/S0094119015000170>.

<sup>152</sup> See, e.g., Nrupen Bhavsar *et al.*, *Housing Precarity and the COVID-19 Pandemic: Impacts of Utility Disconnection and Eviction Moratoria on Infections and Deaths Across US Counties*, (Nat'l Bureau of Econ. Res., Working Paper No. 28394, 2021), <https://www.nber.org/papers/w28394>.

Black and Hispanic homeowners were more than two times as likely to be behind on housing payments as of December 2020.<sup>153</sup> The benefit to avoiding foreclosure for these arguably "marginal" borrowers may be significantly larger compared to the average borrower.

The total benefit to borrowers of delaying foreclosure also depends on the number of foreclosures that would be prevented by the proposed provision; in other words, the difference in the total foreclosures between what would occur under the baseline and what would occur under the proposed delay. To estimate this, the first step is estimating the number of loans that will be more than 120 days delinquent as of the effective date of the proposed rule, currently, August 31, 2021, or that will become 120 days delinquent before the delay period expires. The second step is to estimate what share of these loans would end in a foreclosure sale, and the third step is to estimate how that share would be affected by the proposed provision.

As of January 2021, there were an estimated 2.1 million loans that were at least 90 days delinquent, the large majority of which were in forbearance programs.<sup>154</sup> An unknown number of borrowers whose loans are now delinquent may be able to resume payments at the end of a forbearance period or otherwise bring their loans current before the proposed rule's effective date. One estimate based on current trends and assuming the share of loans in delinquency decreases by less than 3 percent per month, is that 1.7 million loans will be at least 90 days delinquent as of September 2021.<sup>155</sup> However, many of these loans are delinquent because borrowers have been taking advantage of forbearance programs, and some borrowers in that situation may be able to resume payments under their existing mortgage contract at the end of the forbearance. Given the uncertainty about the rate at which loans will exit forbearance or delinquency from now until the proposed effective date, a reasonable approach is to consider a range with respect to the share of loans remaining in forbearance or delinquency based on the current trends. For purposes of illustrating an approach to quantifying the benefits to consumers, the discussion below assumes that as of August 31, 2021, all of the remaining loans will be considered 120 days

<sup>153</sup> Housing Insecurity Report, *supra* note 11.

<sup>154</sup> See Black Jan. 2021 Report, *supra* note 36.

<sup>155</sup> *Id.*

<sup>147</sup> See Am. Enterprise Inst., *National Home Price Appreciation Index* (Jan. 2021), <https://www.aei.org/wp-content/uploads/2021/03/HPA-infographic-Jan.-2021-FINAL.pdf?x91208>.

<sup>148</sup> This estimate from HUD is based on a number of assumptions and circumstances that may not apply to all borrowers who experience a foreclosure sale or those that remediate through non-foreclosures options. U.S. Dep't of Hous. and Urban Dev., *Economic Impact Analysis of the FHA Refinance Program for Borrowers in Negative Equity Positions* (2010), <https://www.hud.gov/sites/documents/IA-REFINANCENEGATIVEEQUITY.PDF>. Adjustment for inflation uses the change in the Consumer Price Index for All Urban Consumers (CPI-U) U.S. city average series for all items, not seasonally adjusted, from January 2010 to February 2021. U.S. Bureau of Labor Statistics, *Consumer Price Index*, <https://www.bls.gov/cpi/>.

delinquent under Regulation X and not in a forbearance plan.

Furthermore, the Bureau assumes that the distribution of performance outcomes as of August 31, 2021, is the same for borrowers who would exit a forbearance program and for borrowers with delinquent loans and never in a forbearance program. The distribution of outcomes for these two groups may depend, for example, on the borrower's loan type and the level of equity the borrower has. If the rate of growth in recovery over time is lower for borrowers with delinquent loans and not in a forbearance program, these borrowers will have a higher incidence of foreclosure. Estimates from February 2021 show that the number of loans in forbearance programs (2.7 million) is significantly larger than the number of borrowers who are seriously delinquent and with loans that are not in a forbearance program (242,000).<sup>156</sup> Given the difference in the size of the two groups, changes in the incidence of foreclosure among borrowers who are delinquent and not in a forbearance program will have a relatively smaller effect on any estimate of the total benefit to borrowers from avoiding foreclosure. The Bureau requests comment on the assumption that the distribution of performance outcomes for borrowers who exit a forbearance plan are similar to borrowers with delinquent loans and not in a forbearance program, in particular any data available to measure the differences in the financial circumstances of these two groups.

Most loans that become delinquent do not end with a foreclosure sale. The Bureau's 2013 RESPA Servicing Rule Assessment Report (Servicing Assessment Report)<sup>157</sup> found that, for a range of loans that became 90 days delinquent from 2005 to 2014, approximately 18 to 35 percent ended in a foreclosure sale within three years of the initial delinquency.<sup>158</sup> Focusing on loans that become 60 days delinquent, the same report found that, 18 months after the initial 60-day delinquency, between 8 and 18 percent of loans had ended in foreclosure sale over the period 2001 to 2016, with an additional 24 to 48 percent remaining at some level of delinquency.<sup>159</sup> An estimate of the rate at which delinquent loans end in foreclosure can be taken from this range albeit with uncertainty as to the extent

<sup>156</sup> See Black Jan. 2021 Report, *supra* note 36. It is possible for a borrower to be delinquent for purposes of Regulation X during a forbearance program. See *supra* note 61 and accompanying text.

<sup>157</sup> See Servicing Rule Assessment Report, *supra* note 13.

<sup>158</sup> *Id.* at 69–70.

<sup>159</sup> *Id.* at 48.

to which these data can be generalized to the current period. For example, using values from 2009 might overestimate the number of foreclosures due to differences in house price growth and the resulting amount of equity borrowers have in their homes. All else equal, this difference might lead to a higher share of delinquent borrowers who prepay.

The Bureau outlines one approach to estimating the baseline number of foreclosures, albeit with significant uncertainty. First, the Bureau considers a range of between one-third and two-thirds of the number of loans that are in forbearance as of February 2021 will be more than 120 days delinquent as of August 31, 2021, and unable to resume contractual payments at that time. This range allows for a lower and upper bound estimate that reflects the substantial uncertainty that exists in forecasting the state of the market and the state of financial circumstances of borrowers as of the effective date of the proposed rule. Next, the Bureau excludes 14 percent of these loans, reflecting an estimate of the share of loans serviced by small servicers to which the proposed rule would not apply.<sup>160</sup> This leaves between roughly 770,000 and 1.5 million loans at risk of an initial filing of foreclosure to which the proposed rule would apply.

The baseline number of such loans that will end with a foreclosure sale can be estimated using data from the Servicing Rule Assessment Report. Using data from 2016 (the latest year reported), 18 months after the initial 60-day delinquency, 8 percent of delinquent loans ended with a foreclosure sale and an additional 24 percent remained delinquent and had not been modified.<sup>161</sup> Of the loans that remain delinquent without a loan modification, the Bureau expects a significant number of these loans will end with a foreclosure sale although the Bureau does not have data to identify the exact share. The Bureau assumes one-half of this group will end with a foreclosure sale, which is a significant share although not a majority of loans.<sup>162</sup> Overall, this gives a baseline

<sup>160</sup> See Bureau of Consumer Fin. Prot., *Data Point: Servicer Size in the Mortgage Market* (Nov. 2019), [https://files.consumerfinance.gov/f/documents/cfpb\\_2019-servicer-size-mortgage-market\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_2019-servicer-size-mortgage-market_report.pdf) (estimating that, as of 2018, approximately 14 percent of mortgage loans were serviced by small servicers).

<sup>161</sup> Servicing Rule Assessment Report, *supra* note 13, at 48.

<sup>162</sup> A large share of foreclosures are not completed within the first 18 months of delinquency, so it is reasonable to assume that many loans that are still delinquent 18 months after an initial 60-day delinquency will eventually end in foreclosure. See

estimate of loans that will experience foreclosure sale of between roughly 155,000 and 310,000. The Bureau requests comment on the assumptions underlying this estimate, including discussion of any data available to predict the share of loans that will end with a foreclosure sale.

The next step is to estimate how the number of foreclosures would change under the proposal. The Bureau proposes that any final rule relating to this proposal would become effective on August 31, 2021, and requires servicers to delay initiation of foreclosure until after December 31, 2021. Because of uncertainty about the exact number of loans that will exit forbearance each month from September to December of 2021, the Bureau assumes that all remaining loans exit forbearance in September. This leads to a maximum four-month delay in the point at which servicers can initiate foreclosure for borrowers with loans that are more than 120 days delinquent between the effective date of the proposed rule and the end of the delay period. This approach also assumes that existing borrower protections do not change. If, for example, forbearance programs and foreclosure moratoria are extended, then the maximum delay period would be shorter and the number of foreclosures prevented would be smaller under the proposed rule.<sup>163</sup> Similarly, if servicers would not immediately initiate foreclosure proceedings with the borrowers absent the rule, then the delay period as a result of the rule would be shorter and the number of foreclosures prevented would be reduced.<sup>164</sup>

Estimating how many foreclosures might be prevented by a four-month delay requires making strong assumptions about the additional

Servicing Rule Assessment Report, *supra* note 13, at 52–53.

<sup>163</sup> An extension of forbearance programs or foreclosure moratoria would reduce the total number of months delay under the proposed rule. This would reduce the number of foreclosures prevented under the rule by the number of loans that self-cure, prepay, or enter into a loan modification during the time between the end of forbearance programs or foreclosure moratoria and December 31, 2021 under the current proposal. The number of loans that will self-cure, prepay, or enter into a loan modification during that period is uncertain given limited information on what the economic circumstances and financial status of borrowers will be at that time.

<sup>164</sup> If servicers delay initiating foreclosure, then the total number of foreclosures prevented under the proposed rule would fall by the number of loans that self-cure, prepay, or enter into a loan modification during that period of time. The number of loans that will self-cure, prepay, or enter into a loan modification during that period is uncertain given limited information on what the economic circumstances and financial status of borrowers will be at that time.

growth in the share of recovered loans over the additional four-month period, where recovered is defined as a self-cure or permanent loan modification. The data available to the Bureau do not provide direct evidence of how protecting this group of borrowers from initiation of foreclosure will affect the likelihood that their loans will ultimately end with a foreclosure sale. In particular, some factors from the current environment that are difficult to generalize using data from earlier periods are: First, borrowers with loans in a forbearance plan may be very different from borrowers with loans that are delinquent but not in a forbearance plan; second, among borrowers with loans in a forbearance plan, some borrowers have made no payments for 18 months while others have made partial or infrequent payments; and, third, borrowers with loans in a forbearance plan are unlikely to have arrearages due at the end of the forbearance period. Any of these differences across borrowers can significantly affect the growth in the share of recovered loans over time. The Bureau requests comment on this assumption, in particular on how the share of recovered loans will change over a four-month period.

The Bureau provides some evidence on the rate at which delinquent loans may recover to estimate the total benefit to borrowers of the provision using information reported in the Servicing Assessment Report. Among borrowers who become 30 days delinquent in 2014: 60 percent recover before their second month of delinquency, 80 percent recover by the 12th month of delinquency, and 85 percent recover by the 24th month of delinquency.<sup>165</sup> These patterns, first, show that most borrowers who become delinquent recover early in their delinquency. Second, the data show that the rate of change in recovery falls as the length of the delinquency increases. For example, after the initial month of delinquency, an additional 20 percent of borrowers recover by the 12th month of delinquency, and then an additional 5 percent of borrowers by the 24th month. On a monthly basis, the number of borrowers who recover increases by less than one percent per month during the

second year.<sup>166</sup> The Bureau notes that the above discussion is based on the recovery experience of loans that became 30 days delinquent. A smaller number of loans became more seriously delinquent. Relative to that smaller base, the share of loans recovering during later periods would be greater.

The proposed pre-foreclosure review period would provide borrowers additional time during which servicers cannot initiate foreclosure. This may increase the number of borrowers who are able to recover, in particular by ensuring more borrowers have the opportunity to pursue foreclosure avoidance options before a servicer makes the first notice or filing required for foreclosure. The size of this increase depends on how much of a difference the delay makes in borrowers' ability to recover. This, in turn, depends on factors such as the financial circumstances of borrowers as of the effective date, the number of foreclosures that servicers would in fact initiate, absent the rule, during the months after the effective date, and the effect of delaying foreclosure on borrowers' ability to obtain loss mitigation options or otherwise recover. The Bureau requests comment on the likelihood that borrowers coming out of forbearance will be able to recover in the months shortly after forbearance ends and how a delay in initiation of foreclosure would affect their ability to recover.

For purposes of illustrating potential benefits of the proposed rule, suppose that the increase in the number of borrowers who are ultimately able to recover as a result of the delay is 0.5 percent per month of delay, which is similar to the monthly rate at which the number of borrowers who have recovered grows during the second year after a 30-day delinquency, as discussed above. Assuming the full four-month delay, the additional share of loans that recover could then be estimated at about 2 percent of the initial group of delinquent loans.<sup>167</sup> The remaining

distribution of outcomes (foreclosure, prepay, and delinquent without loan modification) are estimated based on a constant relative share across groups.<sup>168</sup> This means that 7.9 percent of delinquent loans will end with a foreclosure sale within 18 months. Similar to under the baseline, the Bureau also assumes that one-half of loans that are delinquent and not in a loan modification will end with a foreclosure sale after more than 18 months (meaning an additional 11.8 percent of delinquent loans would end with a foreclosure sale). This generates an estimate of foreclosure sales under the proposed rule of between roughly 152,000 and 304,000, or a reduction of between approximately 2,600 and 5,300 foreclosures.

The Bureau believes that an assumed increase in the likelihood of recovery of 2 percent may significantly overestimate or underestimate the actual effect of the proposed rule on whether loans recover or end with a foreclosure sale. The discussion above relies on data from between 2014 and 2016, which was not a period of economic distress as described earlier. In the current period compared to 2014 and 2016, the level of delinquency is higher and changes in the incidence of recovery over time may be slower. On the other hand, significant house price growth and higher levels of home equity may make it more likely the borrowers can avoid foreclosure if borrowers have better options for selling or refinancing their homes than in 2014 and 2017. The Bureau requests comment on the extent to which the increase in the rate of recovery used for the above estimates is reasonable, including any data that can shed light on this assumption.

Finally, an illustration of the potential total benefit to borrowers of avoiding

recovered loans can be calculated by summing across months.

<sup>165</sup> More specifically, the Bureau assumes that the number of loans that either self-cure or are modified increases by 2 percent, and that other outcomes decrease proportionately. For loans that became 60 days delinquent in 2016, the Bureau estimated that about 46 percent either cured or were modified within 18 months, about 8 percent had ended in foreclosure, about 24 percent remained delinquent, and about 22 percent had prepaid. See Servicing Rule Assessment Report, *supra* note 13, at 48. A 2 percent increase in recovery would mean that the share of loans that recover increases to 47 percent (46 percent  $\times$  1.02) given the additional four-month delay. The assumption of a constant relative share across groups means that an additional recovery reduces the number of foreclosures by 0.15, the number of prepaid by 0.41, and the number of delinquent loans without loan modification by 0.44. An increase in the share of loans that cure or are modified from 46 to 47 percent implies a reduction in the share that end in foreclosure by 18 months to about 7.9 percent, and the share that remain delinquent at 18 months to about 23.6 percent.

<sup>166</sup> The rate of change in borrowers who have recovered is calculated as:  $[(85 \text{ percent} - 80 \text{ percent}) \div 80 \text{ percent}] \times 100 \approx 6 \text{ percent}$ . This gives a monthly average increase in the share of loans that have recovered between the 12th and 24th month of delinquency of approximately 0.5 percent (6 percent  $\div$  12 months).

<sup>167</sup> The extent of the delay depends on when a loan exits forbearance. If the exact number of loans exiting forbearance each month was known, then one could multiply the number of loans exiting forbearance each month by the month-adjusted expected recovery rate. For example, loans that exit in October might have an average recovery rate of 1.5 percent (0.5 percent  $\times$  3 months) and loans that exit in November might have an average expected recovery rate of 1.0 percent (0.5 percent  $\times$  2 months), all else equal. Then, the number of

<sup>165</sup> See Servicing Rule Assessment Report, *supra* note 13, at 85. The data used in this figure are publicly available loan performance data from Fannie Mae. See Fed. Nat'l Mortg. Ass'n, *Fannie Mae Single-Family Loan Performance Data* (Feb. 8, 2021), <https://capitalmarkets.fanniemae.com/credit-risk-transfer/single-family-credit-risk-transfer/fannie-mae-single-family-loan-performance-data>.



foreclosure sales as a result of the proposed provision can be calculated by taking the difference in the number of foreclosure sales under the baseline compared to under the proposed rule and multiplying that difference by the per-borrower cost of foreclosure. Based on a per foreclosure cost to the borrower of \$12,500, the benefit to borrowers of avoiding foreclosure under the proposed rule is estimated at between \$33 million and \$66 million. The estimate is based on a number of assumptions and represents one approach to quantifying the total benefits to borrowers.

The above estimate of the benefit to borrowers of avoiding foreclosure likely underestimates the true value of the benefit. As discussed above, there is evidence that borrowers incur significant non-monetary costs that are not accounted for in the above estimates. Furthermore, there may be non-borrower benefits, such as benefits to neighbors and communities from reduced foreclosures, that are unaccounted for. Therefore, estimates of the total benefit to consumers, which includes the benefit to borrowers and non-borrowers are expected to be larger than the reported estimates.

Some borrowers would benefit from the proposed provision even if they would not have experienced a foreclosure sale under the baseline. Many borrowers are able to cure their delinquency or otherwise avoid a foreclosure sale after the servicer has initiated the foreclosure process. Even though these borrowers do not lose their homes to foreclosure, they may incur foreclosure-related costs, such as legal or administrative costs, from the early stages of the foreclosure process. The proposed provision could mean that some borrowers who would have cured their delinquency after foreclosure is initiated are instead able to cure their delinquency before foreclosure is initiated, meaning that they are able to avoid such foreclosure-related costs. The Bureau does not have data that would permit it to estimate the extent of this benefit of the proposed rule, which would likely vary according to State foreclosure laws and the borrower's specific situation. The Bureau requests comments on this benefit to consumers, including data or other information that could help quantify the benefit.

The proposed provision may create costs for some borrowers if it delays their engagement in the loan modification and loss mitigation process. For some borrowers, notification of foreclosure process initiation may provide the impetus to engage with the servicer to discuss options for avoiding foreclosure. For

these borrowers, delaying the initiation of foreclosure may delay their engagement in determining a next step for resolving the delinquency on the loan, whether it be through repayment, loan modification, foreclosure, or other alternatives. This delay may put the borrower in a worse position because the additional delay can increase unpaid amounts and thereby reduce options to avoid foreclosure. The Bureau does not have data that would permit it to estimate the extent of this cost of the proposed rule. The Bureau requests comments on this cost to consumers, including data or other information that could help quantify the cost.

#### Benefits and Costs to Covered Persons

The proposed provision would impose new costs on servicers and investors by delaying the date at which foreclosure can be initiated, which would prolong the ongoing costs of servicing non-performing loans and delay the point at which servicers are able to complete the foreclosure and sell the property. These costs would apply to foreclosures that the proposed rule would not prevent. As further discussed below, the costs could be mitigated somewhat by a reduction in foreclosure-related costs in cases where the delay in initiating foreclosure permits borrowers to avoid entering into foreclosure altogether.

As discussed above, the Bureau does not have data to quantify the number of loans that will ultimately enter foreclosure or the number that will end with a foreclosure sale, but, as discussed above, past experience and the large number of loans currently in a nonpayment status suggest that as many as 155,000 and 310,000 loans that would be subject to the proposed pre-foreclosure review period could ultimately end in foreclosure. An additional number of loans are likely to enter the foreclosure process but not end in foreclosure because the borrower is able to recover or prepay the loan.

By preventing servicers from initiating foreclosure for most delinquent loans until after December 31, 2021, the proposal could delay many foreclosures from being initiated by up to four months. The delay could be shorter for loans subject to a forbearance that extends past August 31, 2021, including some loans subject to the CARES Act that entered into forbearance later than March 2020 and are extended to a total of up to 18 months. The delay could also be reduced to the extent that servicers would not actually initiate foreclosure for all borrowers who are more than 120

days delinquent and whose loans are not in forbearance in the period between September and December 2021.<sup>169</sup> For foreclosures that are eventually completed, a delay in the initiation of foreclosure would be expected, all else equal, to lead to an equivalent delay in the foreclosure's completion.

Any delay in completing foreclosure will mean additional costs to service the loan before completing foreclosure. This includes, for example, the costs of mailing statements, providing required disclosures, and responding to borrower requests. For loans that are seriously delinquent, servicers may be required by investors to conduct frequent property inspections to determine if properties are occupied and may incur costs to provide upkeep for vacant properties. MBA data report that the annual cost of servicing performing loans in 2017 was \$156 (or \$13 per month) and the annual cost of servicing nonperforming loans was \$2,135 (or approximately \$178 per month).<sup>170</sup> Some costs of servicing delinquent loans would be ongoing each month, including costs of complying with certain of the Bureau's servicing rules. However, many of the average costs of servicing a delinquent loan likely reflect one-time costs, such as the costs of paying counsel to complete particular steps in the foreclosure process, which likely would not increase as a result of a delay. In light of this, the additional servicing costs associated with a delay are likely to be well below \$178 per month for each loan.

In addition, some mortgage servicers are obligated to make some principal and interest payments to investors, even if borrowers are not making payments. Servicers may also be obligated to make escrowed real estate tax and insurance payments to local taxing authorities and insurance companies. The proposal would extend the period of time that servicers must continue making such advances for loans on which they are not receiving payment. Servicers may incur additional costs to maintain the liquid reserves necessary to advance these funds.

When the servicer does not advance principal and interest payments to

<sup>169</sup> Even absent the proposed provision, servicers may be delayed in initiating foreclosure because the attorneys and other service providers that support foreclosure actions may not have capacity to handle the anticipated number of delinquent loans, particularly given that the long foreclosure moratoria have eroded capacity.

<sup>170</sup> Mortg. Bankers Ass'n, *Servicing Operations Study and Forum for Prime and Specialty Servicers* (Dec. 2018), <https://www.mba.org/news-research-and-resources/research-and-economics/single-family-research/servicing-operations-study-and-forum-for-prime-and-specialty-servicers>.

investors, including cases in which a loan's owner is servicing loans on its own behalf, a delay will also impose costs on investors by delaying their receipt of proceeds from foreclosure sales and preventing them from investing those funds and earning an investment return during the time by which a foreclosure sale is delayed. These costs depend on the length of any delay, the amount of funds that the investor stands to recover through a foreclosure sale, and the investor's opportunity cost of funds. For example, the average unpaid principal balance of mortgage loans in forbearance as of February 2021 was reported to be approximately \$200,000.<sup>171</sup> Assuming that investors would invest foreclosure sale proceeds in short-term U.S. Treasury bills, using the six-month U.S. Treasury rate of approximately 0.06 percent in March 2021, the cost of delaying receipt of \$200,000 by four months would be approximately \$40. Assuming instead that investors would invest foreclosure sale proceeds at the Prime rate, 3.25 percent in March 2021, the cost of delaying receipt of \$200,000 by four months would be approximately \$2,170.

Servicers would also incur costs to ensure the proposed provision is not violated. The simplicity of the provision may mean the direct cost of developing systems to ensure compliance is not too great. However, servicers that seek to pursue foreclosure for properties that are not the borrower's principal residence (for example, when a property is vacant and appears to be abandoned) may incur additional costs to ensure that those properties are in fact not the borrower's principal residence so that they do not inadvertently violate the proposed provision. The Bureau understands that making such determinations can be difficult and is the source of significant perceived compliance risk given the possibility of incorrectly concluding that the property is no longer a borrower's principal residence.<sup>172</sup>

The costs to servicers described above may be mitigated somewhat by a reduction in foreclosure-related costs, to the extent that the additional time for borrowers to be considered for loss mitigation options prevents some foreclosures from being initiated. Often, a borrower who is able to obtain a loss mitigation option in the months before

foreclosure would otherwise be initiated would also be able to obtain that option shortly after foreclosure is initiated. In such cases, a delay in initiating foreclosure could mean servicers avoid the costs of initiating and then terminating, the foreclosure process. For example, servicers may avoid certain costs, such as the cost of engaging local foreclosure counsel, that they generally incur during the initial stages of foreclosure and that they may not be able to pass on to borrowers. Even absent the proposed rule, servicers may choose to delay initiating foreclosure for loans that are more than 120 days delinquent, subject to investor requirements, if the probability of recovery is high enough that the benefit of waiting, and potentially avoiding foreclosure-related costs, outweighs the expected cost of delaying an eventual foreclosure sale. By requiring servicers to delay initiating foreclosure until after December 31, 2021, the proposed rule would cause servicers to delay foreclosure even when the net benefit of doing so is negative, and therefore any benefit servicers would receive from delayed foreclosures is expected to be smaller on average than the cost to servicers arising from the delay.

The Bureau seeks comment on the discussion of the benefits and costs of the proposed provision for consumers and covered persons discussed above. In particular, the Bureau seeks comment on data and methodology for estimating the number of foreclosures that could be prevented by the proposed provision, the associated benefits to consumers, and the costs to covered persons associated with a delay in foreclosure sales.

#### Alternative Approach: Potential Exemptions to the Special Pre-Foreclosure Review Period

The Bureau has also considered an alternative in which servicers would be allowed to proceed with the foreclosure process during the special pre-foreclosure review period under certain circumstances. Those circumstances could include cases in which the servicer has determined that the borrower is not eligible for any loss mitigation options or if the borrower has declined all available options. They could also include cases in which the servicer has exercised reasonable diligence to contact the borrower and the servicer has been unable to reach the borrower. Reasonable diligence could potentially be defined to include multi-modal communication attempts, such as making certain numbers and types of communication attempts over a period of 30 days.

Such an alternative could reduce the benefits of the rule for certain borrowers who would receive reduced protection from the pre-foreclosure review period. In general, the benefits of the pre-foreclosure review period would be lower for borrowers who the servicer has determined are not eligible for any loss mitigation options than they would be for other borrowers, because borrowers who have already been denied would be less likely to obtain a loss mitigation option even if afforded additional time. However, the alternative could prevent borrowers from benefiting from the proposed provision in situations where a borrower's eligibility changes within a relatively short period of time, as may happen during this particular economic crisis, as certain businesses may begin to reopen or open more completely based on when different State and local jurisdictions make adjustments to their COVID-19-related restrictions. The Bureau is not aware of data that could reasonably quantify the number of borrowers for whom such an exception would meaningfully reduce their benefits from the proposed provision.

Similarly, the benefits of the proposed pre-foreclosure review period would likely be lower for borrowers whom the servicer is unable to reach. Where servicers are unable to reach a delinquent borrower, the borrower is less likely to apply for or be considered for a loss mitigation option. Moreover, the first notice or filing for foreclosure could prompt communication from some consumers who are otherwise unresponsive to servicer communication attempts. However, there may be some consumers whom the servicer cannot contact within a 30-day period but who would benefit from the proposed provision if they were to contact their servicer later in the pre-foreclosure review period. This might be especially likely because this particular crisis could create unique obstacles that prevent a borrower from contacting their servicer within the first 30 days after they exit their forbearance program. The Bureau is not aware of data that could reasonably quantify the number of borrowers for whom such an exception would meaningfully reduce their benefits from the proposed provision, or the number of borrowers for whom this alternative might provide a benefit if it were to permit a first notice or filing for foreclosure that prompts them to engage with their servicer regarding loss mitigation options.

Servicers would generally benefit from these types of exceptions to the pre-foreclosure review period. To the extent that servicers have the option to

<sup>171</sup> As of February 2021, there were an estimated 2.7 million loans in forbearance representing a total unpaid principle balance of \$537 billion, for an average loan size of approximately \$198,000. See Black Jan. 2021 Report, *supra* note 36, at 7.

<sup>172</sup> Servicing Rule Assessment Report, *supra* note 13, at 173.

initiate the foreclosure process earlier, they will potentially benefit from a reduction in the delay of the overall foreclosure timeline. The exceptions described above may cover situations in which a loan is particularly likely to move to foreclosure, so may be the loans for which the benefit from an earlier initiation of foreclosure is greatest. The extent of such benefit depends on the number of loans that would be covered by these circumstances and the extent to which those loans are in fact loans for which the pre-foreclosure review period would not have increased the likelihood of finding a loss mitigation option.

The Bureau requests comment on the benefits and costs to consumers and covered persons of this alternative, including data and other information that could help quantify those benefits and costs.

#### Alternative Approach: "Grace Period" Rather Than Date Certain

The Bureau has considered an alternative to a pre-foreclosure review period, in which servicers would be prohibited from making the first notice or filing for foreclosure until a certain number of days (*e.g.*, 60 or 120 days) after a borrower exits their forbearance program.

Such an approach would provide additional benefits to some borrowers in forbearance programs compared to the proposed rule, while reducing the benefit to other borrowers who are delinquent but not in forbearance programs. For borrowers who are in a forbearance program that ends well after the effective date of the proposed rule, this alternative approach would provide a longer period than in the proposed rule during which the borrower would be protected from the initiation of foreclosure. For example, a borrower whose forbearance ends on November 30, 2021, would be protected from initiation of foreclosure for approximately one month under the proposed rule, and approximately four months under this alternative. A large share of the borrowers currently in forbearance programs entered into forbearance after April 2020 and could extend their forbearances until November 2021 or later, and borrowers continue to be eligible to enter into forbearance programs. Although some of these borrowers may not in fact extend their forbearances to the maximum allowable extent, many would receive a longer protection from foreclosure under the alternative, which could provide them with a greater opportunity to work with servicers to obtain an alternative to foreclosure.

The alternative would not provide protection for borrowers who do not enter into forbearance programs, meaning that borrowers who are or become delinquent and do not enter forbearance would not receive any benefit from the alternative beyond the existing prohibition on initiating foreclosures until the borrower has been delinquent for more than 120 days.

For servicers, the alternative approach would, like the proposed provision, delay foreclosure for many of the affected borrowers. The cost of delay, on a per-loan and per-month basis, would not be appreciably different under the alternative than under the proposed provision, but the number of foreclosures delayed would likely differ. Whether the number of loans delayed, and the total cost of delay, are larger or smaller under the alternative than under the proposed provision depends on whether the effect of additional delay of loans in forbearance programs that expire after the beginning of the pre-foreclosure review period is greater than the effect of eliminating the delay for loans that are not in forbearance programs but are more than 120 days delinquent during the period that the proposed pre-foreclosure review period would be in effect.

The alternative could be significantly more costly for servicers to implement because it would require servicers to track a new pre-foreclosure review period for each loan exiting a forbearance program and to revise their compliance systems to ensure that they do not initiate foreclosure for loans that are within that pre-foreclosure review period. The alternative could require servicer systems to account for loan-specific fact patterns, such as cases in which a borrower's forbearance period expires but the borrower subsequently seeks to extend the forbearance period. This could introduce complexity that would make the alternative more costly to come into compliance with compared to the proposed provision, which would apply to all covered loans until a certain date. The Bureau does not have data to estimate such additional costs from the proposal.

The Bureau requests comment on the benefits and costs to consumers and covered persons of the alternative, including data and other information that could help quantify those benefits and costs.

#### 2. Evaluation of Loss Mitigation Applications

Proposed § 1024.41(c)(2)(vi) would extend certain exceptions from § 1024.41(c)(2)(i)'s general requirement to evaluate only a complete loss

mitigation application to certain streamlined loan modifications offered to borrowers affected by a COVID-19-related hardship, such as certain modifications offered through the GSEs' Flex Modification Programs, FHA's COVID-19 Owner-Occupant Loan Modification, and other comparable programs. Once a borrower accepts an offer made under proposed § 1024.41(c)(2)(vi), for any loss mitigation application the borrower submitted before that offer, a servicer would no longer be required to comply with § 1024.41(b)(1)'s requirements regarding reasonable diligence to collect a complete loss mitigation application, and a servicer would also no longer be required to comply with § 1024.41(b)(2)'s evaluation and notice requirements. A servicer would be required to immediately resume reasonable diligence efforts as required under § 1024.41(b)(1) with regard to any incomplete loss mitigation application a borrower submitted before the servicer's offer of a trial loan modification plan if the borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or if the borrower requests further assistance.

#### Benefits and Costs to Consumers

The proposed exception may benefit borrowers to the extent that they may be able to receive a loan modification more quickly, or may be more likely to obtain a loan modification at all, without having to submit a complete loss mitigation application. Where the exception to the complete application requirement applies, it will generally result in a reduction in the time necessary to gather required documents and information. In some cases, if borrowers would not otherwise complete a loss mitigation application and could not otherwise obtain a different loss mitigation option, the proposed provision could enable borrowers to obtain a loan modification in the first place.<sup>173</sup> For some borrowers, a loan modification may be their only opportunity to become or remain current and avoid foreclosure. Thus, for some borrowers who obtain a

<sup>173</sup> Under existing § 1024.41(c), servicers may under some circumstances evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option based on the incomplete application if the application has remained incomplete for a significant period of time. § 1024.41(c)(2)(ii). By providing additional conditions under which servicers could offer certain loss mitigation options based on an incomplete application, the proposed provision may increase the likelihood that a borrower is able to qualify for a loss mitigation option after submitting an incomplete application.

loan modification under the proposed exception, the benefit of the provision would be the value of obtaining a loan modification or obtaining a loan modification more quickly, potentially preventing delinquency fees and foreclosure.

As discussed above in part II, as of February 2021 2.7 million borrowers had mortgage loans that were in a forbearance program. Of these, an estimated 14 percent are serviced by small servicers, leaving approximately 2.3 million who would be covered by the proposed rule. Many of these borrowers may recover before the proposed rule's effective date, however the large number and the ongoing economic crisis suggest that many borrowers will be in distress at that time. The Bureau does not have data to estimate the number of distressed borrowers who, as of the proposed rule's effective date, would not be able to complete a loss mitigation application if they were required to complete the application to receive a loan modification offer. However, the Bureau believes that in the present circumstances that percentage could be substantial due to limitations in servicer capacity and the challenges some borrowers face in dealing with the social and economic effects of the COVID-19 pandemic and related economic crisis. As discussed above in part II, if borrowers who are currently in an eligible forbearance program request an extension to the maximum time offered by the government agencies, those loans that were placed in a forbearance program early in the pandemic (March and April 2020) will reach the end of their forbearance period in September and October of 2021. Black Knight data suggest there could be an estimated 800,000 borrowers exiting their forbearance programs after 18 months of forbore payments in September and October of 2021.<sup>174</sup> Although some fraction of the borrowers with loans in these forbearance programs may be able to resume contractual payments at the end of the forbearance period, many may not be able to do so and may seek to modify their loans. Processing complete loss mitigation applications for all these borrowers in a short period of time would likely strain many servicers' resources.<sup>175</sup> This might lead

to more borrowers who have incomplete applications that never reach completion and who could therefore not be considered for a loan modification under the baseline compared to what might occur under standard market conditions. The Bureau also does not have data available to predict how many borrowers with loans currently in a forbearance or a delinquency would experience foreclosure but for a loan modification offered under the proposed exception in the proposed rule.

The proposed provision might create costs for borrowers if it prevents them from considering, and applying for, loss mitigation options that they would prefer to a streamlined loan modification. Borrowers who are considered for a streamlined loan modification after submitting an incomplete application may not be presented with other loss mitigation options that might be offered if they were to submit a complete application. In the 2013 RESPA Servicing Final Rule, the Bureau explained its view that borrowers would benefit from the complete application requirement, in part because borrowers would generally be better able to choose among available loss mitigation options if they are presented simultaneously. The Bureau acknowledges that borrowers accepting an offer made under proposed § 1024.41(c)(2)(vi) would be prevented from considering loss mitigation options that they may prefer to a streamlined loan modification in connection with an incomplete loss mitigation application submitted before the offer. However, if a borrower is interested in and eligible for another form of loss mitigation besides a streamlined loan modification, under the proposal a borrower who received a streamlined loan modification after evaluation of an incomplete application would still retain the ability under § 1024.41 to submit a complete loss mitigation application and receive an evaluation for all available options after the loan modification is in place.

The Bureau requests comments on the benefits to consumers of the proposed provision, including comment on the proposed eligibility criteria the proposed exception, whether those criteria will affect the types of modifications offered to consumers, and

potential effects on consumers as a result.

#### Benefits and Costs to Covered Persons

Servicers would benefit from the reduction in burden from the requirement to process complete loss mitigation applications for streamlined loan modifications that are eligible for the exception. Given the number of loans that are currently delinquent, and in particular the number of such loans in a forbearance program that will end during a short window of time, this benefit could be substantial. Without the proposed provision, in each case, the servicers would further need to exercise reasonable diligence to collect the documentation needed for a complete loss mitigation application, evaluate the complete application, and inform the borrower of the outcome of the application for all available options. The Bureau understands that the process of conducting this evaluation and communicating the decision to consumers can require considerable staff time, including time spent talking to consumers to explain the outcome of the evaluation for all options.<sup>176</sup> This could make the cost of evaluating borrowers for all available options particularly acute in light of staffing challenges servicers may face during the COVID-19 pandemic and associated economic crisis and the large number of borrowers who may be seeking loss mitigation at the same time.

In addition to the reduced costs associated with evaluation for streamlined loan modifications, the proposed provision may reduce servicer costs when evaluating borrowers for other loss mitigation options, by freeing resources that can be used to work with borrowers who may not qualify for streamlined loan modifications or for whom streamlined loan modifications may not be the borrower's preferred option. Many servicers are likely to need to process a large number of applications in a short period of time while complying with the timelines and other requirements of the servicing rules. This may place strain on servicer resources that lead to additional costs, such as the need to pay overtime wages or to hire and train additional staff to process loss mitigation applications. The proposed provision would reduce this strain and could thereby reduce overall servicing costs.

The Bureau does not have data to quantify the reduction in costs to servicers from the proposed provision. The Bureau understands that working

<sup>174</sup> Black Jan. 2021 Report, *supra* note 36, at 9. An estimated 14 percent of all loans are serviced by small servicers, and if that percentage applies to these loans, then an estimated 690,000 loans subject to the proposed rule would exit forbearance in these months.

<sup>175</sup> Servicers have reported challenges in customer-facing staff capacity during the pandemic. See Caroline Patane, *Servicers report biggest*

*challenges implementing COVID-19 assistance programs*, Fed. Nat'l Mortg. Ass'n, Perspectives Blog (Jan. 12, 2020), <https://www.fanniemae.com/research-and-insights/perspectives/servicers-report-biggest-challenges-implementing-covid-19-assistance-programs>. Such challenges could become even more significant if a large number of borrowers seek foreclosure avoidance options during a short period of time after forbearances end.

<sup>176</sup> Servicing Rule Assessment Report, *supra* note 13, at 155–156.

with borrowers to complete applications and to communicate decisions on complete applications often requires significant one-on-one communication between servicer personnel and borrowers. Even a modest reduction in staff time needed for such communication, given the large numbers of borrowers who may be seeking loan modifications, could lead to substantial cost savings.

The Bureau seeks comment on the discussion of the benefits and costs of the proposed provision for consumers and covered persons discussed above. In particular, the Bureau seeks comment on, and data or studies that are informative of, potential effects of the proposal on borrowers' ability to obtain a loss mitigation option that best suits their circumstances as well as potential benefits and costs to servicers.

### 3. Live Contact and Reasonable Diligence Requirements

Proposed § 1024.39(e) would temporarily require servicers to provide additional information to certain borrowers during live contacts established under existing requirements. In general, proposed § 1024.39(e)(1) would require servicers to ask whether borrowers who are not in a forbearance program at the time of the live contact are experiencing a COVID-19-related hardship and if so, to list and briefly describe available forbearance programs to those borrowers and the actions a borrower must take to be evaluated. In general, proposed § 1024.39(e)(2) would require that, for borrowers who are in a forbearance program at the time of live contact, servicers must provide specific information about the borrower's current forbearance program and list and briefly describe available post-forbearance loss mitigation options during the last required live contact made just before the end of the forbearance period. The proposal would not require servicers to make good faith efforts to establish live contact with a borrower beyond those already required by § 1024.39(a).

In conjunction with proposed § 1024.39(e)(2), the proposal would also add a new comment 41(b)1-4.iv, which states that if the borrower is in a short term payment forbearance program made available to borrowers experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency that was offered based on evaluation of an incomplete application, a servicer must contact the borrower no later than 30 days before the end of the forbearance period to determine if the borrower wishes to complete the loss mitigation application and proceed with

a full loss mitigation evaluation. If the borrower requests further assistance, the servicer should exercise reasonable diligence to complete the application before the end of the forbearance period. The servicer must also continue to exercise reasonable diligence to complete the loss mitigation application before the end of forbearance. Comment 41(b)(1)-4.iii already requires servicers to take these steps before the end of the short-term payment forbearance program offered based on the evaluation of an incomplete application, but does not specify how soon before the end of the forbearance program the servicer must make these contacts.

### Benefits and Costs to Consumers and Covered Persons

Proposed § 1024.39(e)(1) would benefit borrowers who are eligible for a forbearance program but not currently in one, by potentially making it more likely that such borrowers are able to take advantage of such programs. Although most borrowers who have missed mortgage payments are in forbearance programs, a significant number of delinquent borrowers are not. Research has found that some borrowers are not aware of the availability of forbearance or misunderstand the terms of forbearance.<sup>177</sup> Similarly, proposed § 1024.39(e)(2), together with proposed comment 41(b)1-4.iv, would benefit borrowers who are delinquent and are nearing the end of a forbearance period by making it more likely that they are aware of their options at the end of the forbearance period in time to take the action most appropriate for their circumstances.

For both proposed provisions, the extent of the benefit would depend to a large degree on whether servicers are already taking the actions that would be required by the proposed provision. The Bureau understands that many servicers already have a practice of informing borrowers about the availability of general or specific forbearance programs, and options when exiting forbearance programs, as part of live

<sup>177</sup> For example, recent survey evidence finds that among borrowers who reported needing forbearance but had not entered forbearance, the fact that they had not entered forbearance was explained by factors including a lack of understanding about how forbearance plans work or whether the borrower would qualify, or a lack of understanding about how to request forbearance. See Lauren Lambie-Hanson et al., *Recent Data on Mortgage Forbearance: Borrower Uptake and Understanding of Lender Accommodations*, Fed. Reserve Bank of Phila. (Mar. 2021), <https://www.philadelphiafed.org/consumer-finance/mortgage-markets/recent-data-on-mortgage-forbearance-borrower-uptake-and-understanding-of-lender-accommodations>.

contact communications.<sup>178</sup> The Bureau is not aware of how many servicers provide general as opposed to specific information about forbearance programs or post-forbearance options that are available to a particular borrower. The Bureau does not have data that could be used to quantify the number of borrowers who would benefit from the proposed provision. As discussed above, an estimated 2.7 million borrowers were in forbearance programs as of January 2021 and an estimated 242,000 borrowers had loans that were seriously delinquent and not in a forbearance program. Although some fraction of the borrowers with loans in a forbearance program may be able to resume contractual payments at the end of the forbearance period, many may benefit from more specific information about the options available to them.

The costs to covered persons of complying with the proposed provision would also depend on the extent to which servicers are already taking the actions required by the proposed provision. Servicers that do not currently take these actions would need to revise call scripts and make similar changes to their procedures when conducting live contact communications.<sup>179</sup> Even servicers that do currently take actions that comply with the proposed provisions would likely incur one-time costs to review policies and procedures and potentially make changes to ensure compliance with the proposal. The Bureau does not have data to determine the extent of such one-time costs. Although the changes are limited, the short timeframe to implement the changes, and the fact that they would be required at a time when servicers are faced with a wide array of challenges related to the pandemic, would tend to make any changes more costly.<sup>180</sup>

<sup>178</sup> For example, Fannie Mae requires servicers to begin attempts to contact the borrower no later than 30 days prior to the expiration of the forbearance plan term to, among other things, determine the reason for the delinquency and educate the borrower on the availability of workout options, as appropriate. Fed. Nat'l Mortg. Ass'n, *Lender Letter (LL-2021-02)* (Feb. 25, 2021), <https://singlefamily.fanniemae.com/media/24891/display>. Servicers that are already complying with such guidelines may already be providing many of the benefits, and incurring many of the costs, that would otherwise be generated by the proposed provision.

<sup>179</sup> Servicers should already have access to the information they would need to provide under the proposed provision, because servicers are required to have policies and procedures to maintain and communicate such information to borrowers under 12 CFR 1024.40(b)(1)(i) and 1024.38(b)(2)(i).

<sup>180</sup> One recent survey of mortgage servicing executives found that they identified adapting to investor policy changes as the biggest challenge in implementing COVID-19 assistance programs. See

The Bureau seeks comment on the discussion of the benefits and costs of the proposed provisions for consumers and covered persons discussed above. In particular, the Bureau seeks data or studies that provide information on the extent to which the proposed provisions could benefit consumers by providing more timely information about their options, as well as on the potential costs to servicers of complying with the proposed provisions.

#### *E. Potential Specific Impacts of the Proposed Rule*

##### **Insured Depository Institutions and Credit Unions With \$10 Billion or Less in Total Assets, As Described in Section 1026**

The Bureau believes that a large majority of depository institutions and credit unions with \$10 billion or less in total assets that are engaged in servicing mortgage loans qualify as “small servicers” for purposes of Regulation X because they service 5,000 or fewer loans, all of which they or an affiliate own or originated. In the past, the Bureau has estimated that more than 95 percent of insured depositories and credit unions with \$10 billion or less in total assets service 5,000 mortgage loans or fewer.<sup>181</sup> The Bureau believes that servicers that service loans that they neither own nor originated tend to service more than 5,000 loans, given the returns to scale in servicing technology. Small servicers would be exempt from the proposed rule and would therefore not be directly affected by the proposed rule.

With respect to servicers that are not small servicers, the Bureau believes that the consideration of benefits and costs of covered persons presented above would generally describe the impacts of the proposed rule on depository institutions and credit unions with \$10 billion or less in total assets that are engaged in servicing mortgage loans.

##### **Impact of the Proposed Provisions on Consumer Access to Credit**

Restrictions on servicers’ ability to foreclose on mortgage loans could, in theory, reduce the expected return to mortgage lending and cause lenders to increase interest rates or reduce access to mortgage credit, particularly for loans with a higher estimated risk of default. The temporary nature of the proposed

rule means that it is unlikely to have long-term effects on access to mortgage credit. In the short run, the Bureau cannot rule out the possibility that the proposed rule would have the effect of increasing mortgage interest rates or delaying access to credit for some borrowers, particularly for borrowers with lower credit scores who may have a higher likelihood of default in the first few months of the loan term. The Bureau does not have a way of quantifying any such effect but notes that it would be limited to the period before the delay period expires. The exemption of small servicers from the proposed rule will help maintain consumer access to credit through these providers.

The Bureau requests comment on the effects of the proposed rule on consumer access to credit, including any data, research results, and other factual information that would help quantify any impact of the proposed rule on consumer access to credit.

##### **Impact of the Proposed Provisions on Consumers in Rural Areas**

Consumers in rural areas may experience benefits from the proposed rule that are different in certain respects from the benefits experienced by consumers in general. Consumers in rural areas may be more likely to obtain mortgages from small local banks and credit unions that either service the loans in portfolio or sell the loans and retain the servicing rights. These servicers may be small servicers that would be exempt from the proposed provisions, although they may already provide most of the benefits to consumers that the proposed rule is designed to provide.

The Bureau will further consider the impact of the proposed rule on consumers in rural areas. The Bureau, therefore, asks interested parties to provide data, research results, and other factual information on the impact of the proposed rule on consumers in rural areas.

#### **VII. Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.<sup>182</sup> The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel

to consult with small business representatives before proposing a rule for which an IRFA is required.<sup>183</sup>

The proposed rule would not apply to entities that are “small servicers” for purposes of the Regulation X: Generally, servicers that service 5,000 or fewer mortgage loans, all of which the servicer or affiliates own or originated. A large majority of small entities that service mortgage loans are small servicers and would therefore not be directly affected by the proposed rule. Although some servicers that are small entities may service more than 5,000 loans and not qualify as small servicers for that reason, the Bureau has previously estimated that approximately 99 percent of small-entity servicers service 5,000 loans or fewer. The Bureau does not have data to indicate whether these institutions service loans that they do not own and did not originate. However, as discussed in the preamble to the 2013 RESPA Servicing Final Rule, the Bureau believes that a servicer that services 5,000 loans or fewer is unlikely to service loans that it did not originate because a servicer that services loans for others is likely to see servicing as a stand-alone line of business and would likely need to service substantially more than 5,000 loans to justify its investment in servicing activities.<sup>184</sup> Therefore, the Bureau has concluded that the proposed rule would not have an effect on a substantial number of small entities.

Accordingly, the Acting Director hereby certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel is required for this proposal. The Bureau requests comment on the analysis above and requests any relevant data.

#### **VIII. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are generally required to seek the Office of Management and Budget’s (OMB’s) approval for information collection requirements prior to implementation. The collections of information related to Regulation X have been previously reviewed and approved by OMB and assigned OMB Control number 3170–0016. Under the PRA, the Bureau may

<sup>183</sup> 5 U.S.C. 609.

<sup>184</sup> 2013 RESPA Servicing Final Rule, *supra* note 13, at 10866. For example, one industry participant estimated that most servicers would need a portfolio of 175,000 to 200,000 loans to be profitable. Bonnie Sinnock, *Servicers Search for ‘Goldilocks’ Size for Max Profits*, Am. Banker (Sept. 10, 2015), <https://www.americanbanker.com/news/servicers-search-for-goldilocks-size-for-max-profits>.

Caroline Patane, *Servicers report biggest challenges implementing COVID-19 assistance programs*, Fed. Nat’l Mortg. Ass’n, Perspectives Blog (Jan. 12, 2020), <https://www.fanniemae.com/research-and-insights/perspectives/servicers-report-biggest-challenges-implementing-covid-19-assistance-programs>.

<sup>181</sup> 81 FR 72160 (Oct. 19, 2016).

<sup>182</sup> 5 U.S.C. 601 *et seq.*

not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The Bureau has determined that this proposed rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

The Bureau has a continuing interest in the public's opinions regarding this determination. At any time, comments regarding this determination may be sent to: The Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, or by email to CFPB\_Public\_PRA@cfpb.gov.

**IX. List of Subjects in 12 CFR Part 1024**

Banks, banking, Condominiums, Consumer protection, Credit unions, Housing, Mortgage insurance, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations.

**X. Authority and Issuance**

For the reasons set forth in the preamble, the Bureau proposes to amend Regulation X, 12 CFR part 1024, as set forth below:

**PART 1024—REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)**

■ 1. The authority citation for part 1024 continues to read as follows:

Authority: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

**Subpart C—Mortgage Servicing**

■ 2. Amend § 1024.31 by adding, in alphabetical order, a definition of “COVID–19-related hardship” to read as follows:

**§ 1024.31 Definitions.**

\* \* \* \* \*

*COVID–19-related hardship* means a financial hardship due, directly or indirectly, to the COVID–19 emergency as defined in the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)).

\* \* \* \* \*

■ 3. Section 1024.39 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

**§ 1024.39 Early intervention requirements for certain borrowers.**

(a) *Live Contact.* Except as otherwise provided in this section, a servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower no later than the 36th day of a borrower’s delinquency and again no later than 36 days after each payment due date so long as the borrower remains delinquent. Promptly after establishing live contact with a borrower, the servicer shall inform the borrower about the availability of loss mitigation options, if appropriate, and take the actions described in paragraph 39(e) of this section, if applicable.

\* \* \* \* \*

(e) *Temporary COVID–19 Related Live Contact.* Until August 31, 2022, in complying with the requirements described in paragraph 39(a), promptly after establishing live contact with a borrower, the servicer shall take the following actions:

(1) *Borrowers not in forbearance programs at the time of live contact.* If the borrower is not in a forbearance program at the time the servicer establishes live contact and the owner or assignee of the borrower’s mortgage loan makes a forbearance program available through the servicer to borrowers experiencing a COVID–19-related hardship, the servicer must ask the borrower whether the borrower is experiencing a COVID–19-related hardship. If the borrower indicates that the borrower is experiencing a COVID–19-related hardship, the servicer shall list and briefly describe to the borrower any such forbearance programs made available and the actions the borrower must take to be evaluated for such forbearance programs.

(2) *Borrowers in forbearance programs at the time of live contact.* If the borrower is in a forbearance program made available to borrowers experiencing a COVID–19-related hardship, during the last live contact made pursuant to paragraph 39(a) of this section that occurs prior to the end of the forbearance period, the servicer must inform the borrower of the following information:

(i) The date the borrower’s current forbearance program ends; and

(ii) A list and brief description of each of the types of forbearance extension, repayment options, and other loss mitigation options made available by the owner or assignee of the borrower’s mortgage loan to resolve the borrower’s delinquency at the end of the forbearance program, and the actions the borrower must take to be evaluated for such loss mitigation options.

- 4. Section 1024.41 is amended by:
  - a. Revising paragraphs (c)(2)(i), and (c)(2)(v)(A)(1);
  - b. Adding paragraph (c)(2)(vi);
  - c. Revising paragraph (f)(1)(i); and
  - d. Adding paragraph (f)(3).

The additions and revisions read as follows:

**§ 1024.41 Loss mitigation procedures.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \* (i) *In general.* Except as set forth in paragraphs (c)(2)(ii), (iii), (v), and (vi) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.

\* \* \* \* \*

(v) \* \* \* (A) \* \* \*

(1) The loss mitigation option permits the borrower to delay paying covered amounts until the mortgage loan is refinanced, the mortgaged property is sold, the term of the mortgage loan ends, or, for a mortgage loan insured by the Federal Housing Administration, the mortgage insurance terminates. For purposes of this paragraph (c)(2)(v)(A)(1), “covered amounts” includes, without limitation, all principal and interest payments forborne under a payment forbearance program made available to borrowers experiencing a COVID–19-related hardship, including a payment forbearance program made pursuant to the Coronavirus Economic Stabilization Act, section 4022 (15 U.S.C. 9056); it also includes, without limitation, all other principal and interest payments that are due and unpaid by a borrower experiencing a COVID–19-related hardship. For purposes of this paragraph (c)(2)(v)(A)(1), “the term of the mortgage loan” means the term of the mortgage loan according to the obligation between the parties in effect when the borrower is offered the loss mitigation option.

\* \* \* \* \*

(vi) *Certain COVID–19-related loan modification options.* (A)

Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a borrower a loan modification based upon evaluation of an incomplete application, provided that all of the following criteria are met:

(1) The loan modification extends the term of the loan by no more than 480 months from the date the loan modification is effective and does not

cause the borrower's monthly required principal and interest payment to increase.

(2) Any amounts that the borrower may delay paying until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures, do not accrue interest; the servicer does not charge any fee in connection with the loan modification, and the servicer waives all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the loan modification.

(3) The loan modification is made available to borrowers experiencing a COVID-19-related hardship.

(4) Either the borrower's acceptance of an offer pursuant to paragraph (c)(2)(vi)(A) of this section ends any preexisting delinquency on the mortgage loan or the loan modification offered pursuant to paragraph (c)(2)(vi)(A) of this section is designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification.

(B) Once the borrower accepts an offer made pursuant to paragraph (c)(2)(vi)(A) of this section, the servicer is not required to comply with paragraph (b)(1) or (2) of this section with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the loan modification described in paragraph (c)(2)(vi)(A) of this section. However, if the borrower fails to perform under a trial loan modification plan offered pursuant to paragraph (c)(2)(vi)(A) of this section or requests further assistance, the servicer must immediately resume reasonable diligence efforts as required under paragraph (b)(1) of this section with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the trial loan modification plan.

\* \* \* \* \*

(f) \* \* \* (1) \* \* \* (i) A borrower's mortgage loan obligation is more than 120 days delinquent and paragraph (f)(3) does not apply;

\* \* \* \* \*

(3) *Special COVID-19 Emergency pre-foreclosure review requirements.* A servicer shall not rely on paragraph (f)(1)(i) to make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until after December 31, 2021.

\* \* \* \* \*

■ 5. In Supplement I to Part 1024 under Subpart C—Mortgage Servicing:

■ *a. Under § 1024.39*—Early intervention requirements for certain borrowers, 39(a) Live contact, revise “39(a) Live contact”; and

■ *b. Under § 1024.41*—Loss mitigation procedures, 41(b)(1) Complete loss mitigation application, revise “41(b)(1) Complete loss mitigation application”.

The revisions read as follows:

**Supplement I to Part 1024—Official Interpretations**

\* \* \* \* \*  
*Subpart C—Mortgage Servicing*  
 \* \* \* \* \*

*§ 1024.39—Early Intervention Requirements for Certain Borrowers*

39(a) Live Contact

1. *Delinquency.* Section 1024.39 requires a servicer to establish or attempt to establish live contact no later than the 36th day of a borrower's delinquency. This provision is illustrated as follows:

i. Assume a mortgage loan obligation with a monthly billing cycle and monthly payments of \$2,000 representing principal, interest, and escrow due on the first of each month.

A. The borrower fails to make a payment of \$2,000 on, and makes no payment during the 36-day period after, January 1. The servicer must establish or make good faith efforts to establish live contact not later than 36 days after January 1—*i.e.*, on or before February 6.

B. The borrower makes no payments during the period January 1 through April 1, although payments of \$2,000 each on January 1, February 1, and March 1 are due. Assuming it is not a leap year; the borrower is 90 days delinquent as of April 1. The servicer may time its attempts to establish live contact such that a single attempt will meet the requirements of § 1024.39(a) for two missed payments. To illustrate, the servicer complies with § 1024.39(a) if the servicer makes a good faith effort to establish live contact with the borrower, for example, on February 5 and again on March 25. The February 5 attempt meets the requirements of § 1024.39(a) for both the January 1 and February 1 missed payments. The March 25 attempt meets the requirements of § 1024.39(a) for the March 1 missed payment.

ii. A borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment is not delinquent for purposes of § 1024.39.

iii. During the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, a borrower is not delinquent for purposes of § 1024.39 if the transferee servicer learns that the borrower has made a timely payment that has been misdirected to the transferor servicer and the transferee servicer documents its files accordingly. *See* § 1024.33(c)(1) and comment 33(c)(1)–2.

iv. A servicer need not establish live contact with a borrower unless the borrower is delinquent during the 36 days after a payment due date. If the borrower satisfies a

payment in full before the end of the 36-day period, the servicer need not establish live contact with the borrower. For example, if a borrower misses a January 1 due date but makes that payment on February 1, a servicer need not establish or make good faith efforts to establish live contact by February 6.

2. *Establishing live contact.* Live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency. Live contact with a borrower includes speaking on the telephone or conducting an in-person meeting with the borrower but not leaving a recorded phone message. A servicer may rely on live contact established at the borrower's initiative to satisfy the live contact requirement in § 1024.39(a). Servicers may also combine contacts made pursuant to § 1024.39(a) with contacts made with borrowers for other reasons, for instance, by telling borrowers on collection calls that loss mitigation options may be available.

3. *Good faith efforts.* Good faith efforts to establish live contact consist of reasonable steps, under the circumstances, to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer. The length of a borrower's delinquency, as well as a borrower's failure to respond to a servicer's repeated attempts at communication pursuant to § 1024.39(a), are relevant circumstances to consider. For example, whereas “good faith efforts” to establish live contact with regard to a borrower with two consecutive missed payments might require a telephone call, “good faith efforts” to establish live contact with regard to an unresponsive borrower with six or more consecutive missed payments might require no more than including a sentence requesting that the borrower contact the servicer with regard to the delinquencies in the periodic statement or in an electronic communication. Comment 39(a)–6 discusses the relationship between live contact and the loss mitigation procedures set forth in § 1024.41.

4. *Promptly inform if appropriate.*

i. *Servicer's determination.* Except as provided in § 1024.39(e), it is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances. The following examples demonstrate when a servicer has made a reasonable determination regarding the appropriateness of providing information about loss mitigation options.

A. A servicer provides information about the availability of loss mitigation options to a borrower who notifies a servicer during live contact of a material adverse change in the borrower's financial circumstances that is likely to cause the borrower to experience a long-term delinquency for which loss mitigation options may be available.

B. A servicer does not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.

ii. *Promptly inform.* If appropriate, a servicer may inform borrowers about the



availability of loss mitigation options orally, in writing, or through electronic communication, but the servicer must provide such information promptly after the servicer establishes live contact. Except as provided in § 1024.39(e), a servicer need not notify a borrower about any particular loss mitigation options at this time; if appropriate, a servicer need only inform borrowers generally that loss mitigation options may be available. If appropriate, a servicer may satisfy the requirement in § 1024.39(a) to inform a borrower about loss mitigation options by providing the written notice required by § 1024.39(b)(1), but the servicer must provide such notice promptly after the servicer establishes live contact.

5. *Borrower's representative.* Section 1024.39 does not prohibit a servicer from satisfying its requirements by establishing live contact with and, if applicable, providing information about loss mitigation options to a person authorized by the borrower to communicate with the servicer on the borrower's behalf. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring a person that claims to be an agent of the borrower to provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.

6. *Relationship between live contact and loss mitigation procedures.* If the servicer has established and is maintaining ongoing contact with the borrower under the loss mitigation procedures under § 1024.41, including during the borrower's completion of a loss mitigation application or the servicer's evaluation of the borrower's complete loss mitigation application, or if the servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation options, the servicer complies with § 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact. A servicer must resume compliance with the requirements of § 1024.39(a) for a borrower who becomes delinquent again after curing a prior delinquency.

\* \* \* \* \*

#### § 1024.41—Loss Mitigation Procedures

\* \* \* \* \*

##### 41(b)(1) Complete Loss Mitigation Application

1. *In general.* A servicer has flexibility to establish its own application requirements and to decide the type and amount of information it will require from borrowers applying for loss mitigation options. In the course of gathering documents and information from a borrower to complete a loss mitigation application, a servicer may stop collecting documents and information for a particular loss mitigation option after receiving information confirming that, pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan, the borrower is ineligible for that option. A servicer may not stop

collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference but may stop collecting documents and information for any loss mitigation option based on the borrower's stated preference in conjunction with other information, as prescribed by any requirements established by the owner or assignee. A servicer must continue to exercise reasonable diligence to obtain documents and information from the borrower that the servicer requires to evaluate the borrower as to all other loss mitigation options available to the borrower. For example:

i. Assume a particular loss mitigation option is only available for borrowers whose mortgage loans were originated before a specific date. Once a servicer receives documents or information confirming that a mortgage loan was originated after that date, the servicer may stop collecting documents or information from the borrower that the servicer would use to evaluate the borrower for that loss mitigation option, but the servicer must continue its efforts to obtain documents and information from the borrower that the servicer requires to evaluate the borrower for all other available loss mitigation options.

ii. Assume applicable requirements established by the owner or assignee of the mortgage loan provide that a borrower is ineligible for home retention loss mitigation options if the borrower states a preference for a short sale and provides evidence of another applicable hardship, such as military Permanent Change of Station orders or an employment transfer more than 50 miles away. If the borrower indicates a preference for a short sale or, more generally, not to retain the property, the servicer may not stop collecting documents and information from the borrower pertaining to available home retention options solely because the borrower has indicated such a preference, but the servicer may stop collecting such documents and information once the servicer receives information confirming that the borrower has an applicable hardship under requirements established by the owner or assignee, such as military Permanent Change of Station orders or employment transfer.

2. *When an inquiry or prequalification request becomes an application.* A servicer is encouraged to provide borrowers with information about loss mitigation programs. If in giving information to the borrower, the borrower expresses an interest in applying for a loss mitigation option and provides information the servicer would evaluate in connection with a loss mitigation application, the borrower's inquiry or prequalification request has become a loss mitigation application. A loss mitigation application is considered expansively and includes any "prequalification" for a loss mitigation option. For example, if a borrower requests that a servicer determine if the borrower is "prequalified" for a loss mitigation program by evaluating the borrower against preliminary criteria to determine eligibility for a loss mitigation option, the request constitutes a loss mitigation application.

3. *Examples of inquiries that are not applications.* The following examples

illustrate situations in which only an inquiry has taken place and no loss mitigation application has been submitted:

i. A borrower calls to ask about loss mitigation options and servicer personnel explain the loss mitigation options available to the borrower and the criteria for determining the borrower's eligibility for any such loss mitigation option. The borrower does not, however, provide any information that a servicer would consider for evaluating a loss mitigation application.

ii. A borrower calls to ask about the process for applying for a loss mitigation option but the borrower does not provide any information that a servicer would consider for evaluating a loss mitigation application.

4. Although a servicer has flexibility to establish its own requirements regarding the documents and information necessary for a loss mitigation application, the servicer must act with reasonable diligence to collect information needed to complete the application. A servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Reasonable diligence for purposes of § 1024.41(b)(1) includes, without limitation, the following actions:

i. A servicer requires additional information from the applicant, such as an address or a telephone number to verify employment; the servicer contacts the applicant promptly to obtain such information after receiving a loss mitigation application;

ii. Servicing for a mortgage loan is transferred to a servicer and the borrower makes an incomplete loss mitigation application to the transferee servicer after the transfer; the transferee servicer reviews documents provided by the transferor servicer to determine if information required to make the loss mitigation application complete is contained within documents transferred by the transferor servicer to the servicer; and

iii. A servicer offers a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application and provides the borrower the written notice pursuant to § 1024.41(c)(2)(iii). If the borrower remains in compliance with the short-term payment forbearance program or short-term repayment plan, and the borrower does not request further assistance, the servicer may suspend reasonable diligence efforts until near the end of the payment forbearance program or repayment plan. However, if the borrower fails to comply with the program or plan or requests further assistance, the servicer must immediately resume reasonable diligence efforts. Near the end of a short-term payment forbearance program offered based on an evaluation of an incomplete loss mitigation application pursuant to § 1024.41(c)(2)(iii), and prior to the end of the forbearance period, if the borrower remains delinquent, a servicer must contact the borrower to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation.

iv. If the borrower is in a short term payment forbearance program made available

to borrowers experiencing a COVID-19-related hardship, including a payment forbearance program made pursuant to the Coronavirus Economic Stability Act, section 4022 (15 U.S.C. 9056), that was offered to the borrower based on evaluation of an incomplete application, a servicer must contact the borrower no later than 30 days before the end of the forbearance period to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation. If the borrower requests further assistance, the servicer must exercise reasonable diligence to

complete the application before the end of the forbearance period.

5. *Information not in the borrower's control.* A loss mitigation application is complete when a borrower provides all information required from the borrower notwithstanding that additional information may be required by a servicer that is not in the control of a borrower. For example, if a servicer requires a consumer report for a loss mitigation evaluation, a loss mitigation application is considered complete if a borrower has submitted all information required from the borrower without regard to

whether a servicer has obtained a consumer report that a servicer has requested from a consumer reporting agency.

\* \* \* \* \*

Dated: April 2, 2021.

**David Uejio,**

*Acting Director, Bureau of Consumer  
Financial Protection.*

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