

**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:** Final rule; official interpretation.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to amend Regulation X to assist mortgage borrowers affected by the COVID–19 emergency. The final rule establishes temporary procedural safeguards to help ensure that borrowers have a meaningful opportunity to be reviewed for loss mitigation before the servicer can make the first notice or filing required for foreclosure on certain mortgages. In addition, the final rule 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 is also finalizing certain temporary amendments to the early intervention and reasonable diligence obligations that Regulation X imposes on mortgage servicers.

**DATES:** This final rule is effective on August 31, 2021.

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

To provide relief for mortgage borrowers facing financial hardship due to the COVID–19 pandemic, the Bureau is finalizing amendments to Regulation X's mortgage servicing rules.<sup>1</sup> As described in more detail in part II, the

<sup>1</sup> This final rule finalizes the proposed amendments to Regulation X that the Bureau issued on April 5, 2021, with revisions as discussed herein. 86 FR 18840 (Apr. 9, 2021).

COVID–19 pandemic has had a devastating economic impact in the United States, making it difficult for some borrowers to stay current on their mortgage payments. To help struggling borrowers, various Federal and State protections have been established throughout the last 16 months, including the forbearances made available by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)<sup>2</sup> and various Federal and State foreclosure moratoria.<sup>3</sup> These protections will begin to phase out over the summer. A large number of borrowers remain seriously delinquent and will be at risk of foreclosure initiation this fall. This final rule will help ensure a smooth and orderly transition as the other Federal and State protections end by providing borrowers with a meaningful opportunity to explore ways to resume making payments and avoid foreclosure. This final rule will also help promote housing security by preventing avoidable foreclosures and keeping borrowers on the path to wealth creation through homeownership. The Bureau recognizes that some foreclosures are unavoidable and that not every borrower will be able to stay in their home indefinitely.

Borrowers who are in forbearance, or behind on their mortgages and not in forbearance, are disproportionately Black and Hispanic, just as those workers whose re-employment continues to lag are disproportionately Black and Hispanic.<sup>4</sup> Black and Hispanic borrowers also are disproportionately likely to have less equity in their homes. Thus, Black and Hispanic borrowers, and the communities in which they live, are especially likely to benefit from this rule.<sup>5</sup> As homeownership plays the primary role in wealth creation in the United States,<sup>6</sup> a wave of foreclosures due to the current crisis may have a lasting impact on these borrowers' ability to maintain and accumulate wealth.

Since last spring when the CARES Act was passed, servicers placed over 7

<sup>2</sup> The Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, 134 Stat. 281 (2020) (CARES Act).

<sup>3</sup> *Id.*

<sup>5</sup> Bureau of Consumer Fin. Prot., *Characteristics of Mortgage Borrowers During the COVID–19 Pandemic* at 5 (May 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_characteristics-mortgage-borrowers-during-covid-19-pandemic\\_report\\_2021-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_characteristics-mortgage-borrowers-during-covid-19-pandemic_report_2021-05.pdf) (CFPB Mortgage Borrower Pandemic Report).

<sup>6</sup> Nat'l Ass'n of Home Builders, *Homeownership Remains Primary Driver of Household Wealth*, NAHB Now Blog (Feb. 18, 2021), <https://nahbnow.com/2021/02/homeownership-remains-primary-driver-of-household-wealth/>.

million borrowers into forbearance programs.<sup>7</sup> During this same period, servicers have adapted to rapidly changing guidance and transitioned their own workforces to remote work. The Bureau recognizes the effort that took, and the challenge that still lies before the industry. While forbearance numbers have continued to drop,<sup>8</sup> those borrowers still in forbearance are increasingly many months, even more than a year, behind on their mortgage payments. At the same time, increasing numbers of borrowers are exiting forbearance while delinquent without loss mitigation in place.<sup>9</sup> The ways servicers may have handled loss mitigation in the past, including the allocation of resources and communication methods used, may not be as effective in these unprecedented circumstances.

The Bureau is concerned that a potentially historically high number of borrowers will seek assistance from their servicers at approximately the same time this fall, which could lead to delays and errors as servicers work to process a high volume of loss mitigation inquiries and applications. 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.

**Final Rule**

To address these concerns, this final rule includes five key amendments to Regulation X, all of which encourage borrowers and servicers to work together to facilitate review for foreclosure avoidance options. First, to help ensure that borrowers have a meaningful opportunity to be reviewed for loss mitigation, this final rule establishes temporary special COVID–19 procedural safeguards that must be met for certain mortgages before the servicer can make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process because of a delinquency. This requirement generally is applicable only if (1) the borrower's mortgage loan obligation became more than 120 days

<sup>7</sup> Black Knight Mortg. Monitor, *April 2021 Report* at 10 (Apr. 2021), [https://cdn.blackknightinc.com/wp-content/uploads/2021/06/BKI\\_MM\\_Apr2021\\_Report.pdf](https://cdn.blackknightinc.com/wp-content/uploads/2021/06/BKI_MM_Apr2021_Report.pdf) (Black Apr. 2021 Report).

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 10.

delinquent on or after March 1, 2020, and (2) the statute of limitations applicable to the foreclosure action being taken in the laws of the State or municipality where the property securing the mortgage loan is located expires on or after January 1, 2022. This provision expires on January 1, 2022, meaning that the procedural safeguards are not applicable if a servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process on or after January 1, 2022. A procedural safeguard has been met, and the servicer may proceed with foreclosure, if: (1) The borrower submitted a completed loss mitigation application and § 1024.41(f)(2) permits the servicer to make the first notice or filing; (2) the property securing the mortgage loan is abandoned under State or municipal law; or (3) the servicer has conducted specified outreach and the borrower is unresponsive.

Second, the final rule permits servicers to offer certain streamlined loan modification options made available to borrowers with COVID-19-related hardships based on the evaluation of an incomplete loss mitigation application. Eligible loan modifications must satisfy certain criteria that aim to establish sufficient safeguards to help ensure that a borrower is not harmed if the borrower chooses to accept an offer of an eligible loan modification based on the evaluation of an incomplete application. First, to be eligible, 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. Second, if the loan modification permits the borrower to delay paying certain amounts until the mortgage loan is refinanced, the mortgaged property is sold, the loan modification matures, or, for a mortgage loan insured by the Federal Housing Administration (FHA), the mortgage insurance terminates, those amounts must not accrue interest. Third, the loan modification must be made available to borrowers experiencing a COVID-19-related hardship. Fourth, 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. Finally, 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 that were incurred on or after March 1, 2020, promptly upon the borrower's acceptance of the loan modification. If the borrower accepts an offer made pursuant to this new exception, the final rule excludes 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 acknowledgement notice required by § 1024.41(b)(2). However, if the borrower fails to perform under a trial loan modification plan offered pursuant to the proposed new exception or requests further assistance, the final rule requires 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 and to provide the borrower with the acknowledgement notice required by § 1024.41(b)(2) with regard to the most recent loss mitigation application the borrower submitted prior to the offer that the servicer made under the new exception, unless the servicer has already provided that notice to the borrower.

Third, the final rule amends the early intervention obligations to help ensure that servicers communicate timely and accurate information to borrowers about their loss mitigation options during the current crisis. In general, the final rule requires servicers to discuss specific additional COVID-19-related information during live contact with borrowers established under existing § 1024.39(a) in two circumstances: (1) If the borrower is not in a forbearance program and (2) if the borrower is near the end of a forbearance program made available to borrowers experiencing a COVID-19-related hardship. Specifically, 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 inform the borrower that forbearance programs are available for borrowers experiencing such a hardship. Unless the borrower states they are not interested, the servicer must also list and briefly describe to the borrower those

forbearance programs made available at that time and the actions the borrower must take to be evaluated. The servicer must also identify at least one way that the borrower can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement. If the borrower is in a forbearance program made available to borrowers experiencing a COVID-19-related hardship, then during the live contact made pursuant to § 1024.39(a) that occurs at least 10 days and no more than 45 days before the scheduled end of the forbearance program, the servicer must provide certain information to the borrower. The servicer must inform the borrower of the date the borrower's current forbearance program is scheduled to end. 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 at that time, and the actions the borrower must take to be evaluated for such loss mitigation options. Finally, the servicer must identify at least one way that the borrower can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement. This provision is temporary and will end on October 1, 2022.

Fourth, the final rule clarifies 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 final rule specifies that a servicer must contact the borrower no later than 30 days before the end of the forbearance period if the borrower remains delinquent 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 final rule defines COVID-19-related hardship to mean a financial hardship due, directly or indirectly, to the national emergency for the COVID-19 pandemic declared in Proclamation 9994 on March 13, 2020 (beginning on March 1, 2020) and continued on February 24, 2021, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C.1622(d)).

## II. Background

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

In January 2013, the Bureau issued a final mortgage servicing rule to implement the Real Estate Settlement Procedures Act of 1974 (RESPA) (2013 RESPA Servicing Final Rule),<sup>10</sup> and included these rules in Regulation X.<sup>11</sup> The Bureau later clarified and revised Regulation X's servicing rules through several additional notice-and-comment rulemakings.<sup>12</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>13</sup> When the housing crisis began, servicers were faced with historically high numbers of delinquent mortgages, loan modification requests, and in-process foreclosures in

<sup>10</sup> Real Estate Settlement Procedures Act of 1974, Public Law 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. 2601 *et seq.*).

<sup>11</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>12</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), 78 FR 62993 (Oct. 23, 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>13</sup> *See generally* 2013 RESPA Servicing Final Rule, *supra* note 11, at 10699-701.

their portfolios.<sup>14</sup> Many servicers lacked the infrastructure, trained staff, controls, and procedures needed to manage effectively the flood of delinquent mortgages they were obligated to handle.<sup>15</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>16</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>17</sup> and requiring certain communication efforts with delinquent borrowers.<sup>18</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>19</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>20</sup> These requirements are discussed more fully in the section-by-section analysis in part IV.

The Bureau published an assessment of the 2013 RESPA Servicing Final Rule in 2019.<sup>21</sup> The assessment analyzed the effects of the rule on borrowers and servicers. Among other things, the assessment concluded that loans that became delinquent were less likely to proceed to a foreclosure sale during the months after the rule's effective date compared to months before the effective

<sup>14</sup> *See* 2013 RESPA Servicing Rule Assessment Report, *supra* note 11, at 37-60.

<sup>15</sup> 2013 RESPA Servicing Final Rule, *supra* note 11, at 10700.

<sup>16</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>17</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>18</sup> 12 CFR 1024.39.

<sup>19</sup> 12 CFR 1024.41(f) through (g).

<sup>20</sup> 12 CFR 1024.41(f)(1)(i).

<sup>21</sup> 2013 RESPA Servicing Rule Assessment Report, *supra* note 11.

date.<sup>22</sup> Moreover, the assessment found that delinquent borrowers were somewhat more likely than they were pre-rule to start applying for loss mitigation earlier in delinquency.<sup>23</sup> Also, the assessment found that loans that became delinquent were more likely to recover from delinquency (that is, to return to current status, including through a modification of the loan terms) after the rule's effective date.<sup>24</sup> The assessment also determined that the rule's general prohibition on initiating foreclosure within the first 120 days of delinquency prevented rather than delayed foreclosures.<sup>25</sup> Finally, the assessment also found that servicing costs increased substantially between 2008 and 2013.<sup>26</sup>

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>27</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.<sup>28</sup> The June 2020 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>29</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 FHA, the mortgage insurance terminates.

### B. Forbearance Programs Offered Under CARES Act

The CARES Act was signed into law on March 27, 2020. Under the CARES Act, a borrower with a federally backed loan may request a 180-day forbearance that may be extended for another 180

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.* at 12.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> 86 FR 11599 (Feb. 26, 2021).

<sup>28</sup> 85 FR 39055 (June 30, 2020).

<sup>29</sup> *See* 12 CFR 1024.41(c)(2).

days at the request of the borrower if the borrower attests to having a COVID-related financial hardship. Servicers must grant these forbearance programs to 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. Through its mortgage market monitoring throughout the pandemic, the Bureau understands that servicers of mortgage loans that are not federally backed offer similar forbearance programs to borrowers affected by the COVID-19 emergency.

In February of 2021, FHA, the Federal Housing Finance Agency (FHFA), Department of Agriculture (USDA), and Department of Veterans Affairs (VA) announced they were expanding their forbearance programs beyond the minimum required by the CARES Act. 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>30</sup> In addition to the expansion of the programs, on June 24, 2021, FHA, USDA, and VA extended the period for borrowers to be approved for a forbearance program from their mortgage servicer through the end of September.<sup>31</sup> FHFA has not announced a deadline to request initial forbearance for loans purchased or securitized by the GSEs. To date, data on borrowers reentering or requesting forbearance suggests borrower are still using these programs.

While forbearance has been a resource for many borrowers, not all borrowers will be able to recover from such severe delinquency. As discussed more fully in part VII, historical data suggests that many borrowers with who are delinquent a year or longer have trouble resuming payments successfully and are more likely to experience foreclosure than borrowers with shorter delinquencies. Additionally, long-term forbearance can erode equity, which may make selling the home as an alternative to foreclosure less viable.

<sup>30</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>31</sup> The Bureau recognizes that the government agencies may adjust their programs further in the coming months, and the Bureau will continue to coordinate with the agencies.

The risks of extended forbearance and severe delinquency are more pronounced in some communities. For example, Bureau research found that, during the pandemic, mortgage forbearance and delinquency rates have been significantly more common in communities of color and lower-income areas.<sup>32</sup> Since homeownership rates vary significantly by race and ethnicity, if borrowers of these communities are not able to recover and 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. For example, 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>33</sup> Given the racial inequities in homeownership and disproportionately higher mortgage forbearance and delinquency in communities of color and lower income areas, the Bureau anticipates that these communities are especially likely to benefit from the protections of this rule.

### C. Borrowers With Loans in Forbearance

There is a lot of uncertainty about the number of borrowers who will exit forbearance this fall. The volume of borrowers exiting forbearance programs is expected to fluctuate throughout the summer as borrowers' forbearance periods end and borrowers either exit forbearance or extend their forbearance for another three-month period. June 2021 presents a substantial period of potential exits of early forbearance entrants, who reached 15 months of forbearance in June. Black Knight estimates there could be slightly fewer than 400,000 exits in June if current trends continue.<sup>34</sup> This will be the last review for exit or extension before the review in September for borrowers who entered forbearance in March of 2020 and who will reach the maximum 18 months of forbearance that month. While a significant number of early entrants exited forbearance in the last 60 days,<sup>35</sup> an estimated 900,000 borrowers

<sup>32</sup> CFPB Mortgage Borrower Pandemic Report, *supra* note 5.

<sup>33</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/>.

<sup>34</sup> *Id.* at 8.

<sup>35</sup> An estimated 413,000 borrowers exited forbearance in May. *Id.* at 9.

could still exit forbearance by the end of 2021.<sup>36</sup> As a result, this fall, servicers may need to assist a significant number of borrowers with post-forbearance loss mitigation review. As of May 18, 2021, Black Knight reports 5 percent of borrowers remain past due on their mortgage but are in active loss mitigation.<sup>37</sup> This number may also fluctuate as borrowers who remain in forbearance may not be able to cure their delinquency when they exit forbearance and many borrowers may need a more permanent reduction in their mortgage payment amount through a loan modification.

As of May 25, 2021, forbearance program starts hit their highest level in several weeks.<sup>38</sup> The increase in forbearance program starts can be attributed to elevated volume of borrowers who were previously in forbearance during the COVID-19 emergency reentering or restarting forbearance.<sup>39</sup> A similar scenario was observed after a spike in exits in early October 2020 as restart activity increased then as well. This was when the first wave of forbearance entrants reached their six-month review for extension and removal.<sup>40</sup> There was also a slight increase in new forbearance plan starts. This may be an indication that many borrowers continue to experience mortgage payment uncertainty.

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

Since the beginning of the COVID-19 emergency, investors and servicers have implemented several post-forbearance repayment options and other loss mitigation options to assist borrowers experiencing a COVID-19-related

<sup>36</sup> *Id.*

<sup>37</sup> Black Apr. 2021 Report, *supra* note 7, at 10.

<sup>38</sup> Andy Walden, *Forbearance Volumes Increase Again Moderate Opportunity for Additional Improvement in June*, Black Knight Mortg. Monitor Blog (May 28, 2021), [https://www.blackknightinc.com/blog-posts/forbearance-volumes-increase-again-moderate-opportunity-for-additional-improvement-in-early-june/?utm\\_term=Forbearance%20Volumes%20Increase%20Again%2C%20Moderate%20Opportunity%20for%20Additional%20Improvement%20in%20Early%20June&utm\\_campaign=An%20Update%20from%20Vision%20%5Cu2013%20Black%20Knight%27s%20Blog&utm\\_content=email&utm\\_source=Act-On-Software&utm\\_medium=RSS%20Email](https://www.blackknightinc.com/blog-posts/forbearance-volumes-increase-again-moderate-opportunity-for-additional-improvement-in-early-june/?utm_term=Forbearance%20Volumes%20Increase%20Again%2C%20Moderate%20Opportunity%20for%20Additional%20Improvement%20in%20Early%20June&utm_campaign=An%20Update%20from%20Vision%20%5Cu2013%20Black%20Knight%27s%20Blog&utm_content=email&utm_source=Act-On-Software&utm_medium=RSS%20Email) (Black May 2021 Blog).

<sup>39</sup> A borrower that "restarts" a forbearance program is a borrower whose loan was previously in forbearance, who formally exited the forbearance program, arranged to pay-off any delinquent amounts, but ultimately reentered into a forbearance program.

<sup>40</sup> Black Apr. 2021 Report, *supra* note 7, at 8.

hardship. For example, servicers have offered borrowers repayment plans, payment deferral programs or partial claims programs, and loan modification programs. There are additional options for borrowers who 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.

#### E. Loans Exiting Forbearance

As of April 2021, there were 1.9 million borrowers 90 days or more delinquent on their mortgage payments.<sup>41</sup> Of those borrowers, 90 percent are either in forbearance or are involved in other loss mitigation discussions with their servicers.<sup>42</sup> This includes loans that reentered or restarted forbearance previously. For loans that became seriously delinquent after the COVID-19 emergency, 97 percent of these loans are either in forbearance programs or other loss mitigation options.<sup>43</sup>

While the industry seems to have recovered from the peak periods of forbearance, many factors in the market suggest that overall risk is still elevated. Since January 2020,<sup>44</sup> there have been approximately 7.2 million loans that have entered a forbearance program.<sup>45</sup> Of the subset of loans that exited forbearance and have either cured or received a workout solution, such as loss mitigation, approximately 3.3 million borrowers are reperforming as of May 2021.<sup>46</sup> Another 1.2 million have paid-off their mortgage in full most likely through refinancing or selling their home.<sup>47</sup> In addition, as of May 18, 2021, there were an estimated 365,000 borrowers who have exited forbearance and were in an active loss mitigation option.<sup>48</sup> As the population of borrowers exiting after 18 months of forbearance (and possibly as many missed payments) grows, the Bureau expects the number of borrowers who will not be able to bring their mortgage current will also grow. Many of these borrowers will need to be evaluated for permanent loss mitigation, such as loan modifications, which can decrease their monthly payment, to avoid foreclosure.

Also noted earlier, there is a high volume of borrowers who remain in prolonged forbearance that are FHA and VA borrowers. The programs offered by these borrowers may be more complicated to navigate or streamlined products may not be available resulting in the need for higher-touch communication with their servicer.

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 on in the pandemic (March and April 2020) will reach the end of their maximum 18-month forbearance period in September and October of 2021. Black Knight data suggested as of mid-March, there would be an estimated 475,000 programs on track to remain active and reach their 18-month expirations at the end of September, with another 275,000 at the end of October.<sup>49</sup> However, due to recent forbearance exits, those estimates have now fallen to approximately 385,000 and 225,000.<sup>50</sup> These numbers are expected to fluctuate depending on exit volume of early forbearance entrants, especially near the end of June 2021 during the 15-month review. However, even with the recent exits, there could be nearly 900,000 borrowers exiting forbearance by the end of the year.<sup>51</sup> This could pose challenges for servicers.

This potentially historically high volume of borrowers exiting forbearance within a short period of time could strain servicer capacity, possibly resulting in delays or errors in processing loss mitigation requests. It remains unclear how many borrowers in a forbearance program will exit forbearance at 15 months in June rather than exercising any additional remaining 3-month extensions.

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 period of time. This lack of historical precedent creates uncertainty. The Bureau anticipates that many borrowers who continue to be adversely affected by the COVID-19 emergency will utilize the maximum allowable months of forbearance and most will exit in the fall.

#### F. Delinquent Loans Not in a Forbearance Program or Loss Mitigation

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 in some type of loss mitigation.

As of end of April 2021, there were an estimated 158,000 seriously delinquent borrowers who were delinquent before the pandemic started and are not in a forbearance program. There are another 33,000 borrowers who became seriously delinquent after the pandemic began and had not entered a forbearance program and were not in active loss mitigation.<sup>52</sup>

In addition, as of May 18, 2021, there were 168,000 forbearance program exits by borrowers who are not yet in loss mitigation and remain delinquent.<sup>53</sup> However, more than an estimated 110,000 of those loans were already delinquent before the COVID-19 emergency.<sup>54</sup>

#### G. Loans at Heightened Risk of Avoidable Foreclosure

Since the CARES Act took effect in March of 2020, various Federal and State foreclosure moratoria have been established. As of June 24, 2021, FHFA, FHA, VA, and USDA had emergency foreclosure moratoria in effect until July 31, 2021.<sup>55</sup> Most foreclosure proceedings have been halted as a result of the moratoria, and therefore foreclosures are at historic lows.<sup>56</sup> In April 2021, there were 3,700 foreclosures initiated and the

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.* at 10.

<sup>54</sup> *Id.*

<sup>55</sup> See Press Release, The White House, *FACT SHEET: Biden-Harris Administration Announces Initiatives to Promote Housing Stability By Supporting Vulnerable Tenants and Preventing Foreclosures* (June 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-biden-harris-administration-announces-initiatives-to-promote-housing-stability-by-supporting-vulnerable-tenants-and-preventing-foreclosures/> (the Department of Housing and Urban Development (HUD), Department of Veterans Affairs (VA), and Department of Agriculture (USDA)—will extend their respective foreclosure moratorium for one, final month, until July 31, 2021). Furthermore, the Bureau recognizes that these government agencies may adjust their programs further in the coming months, and the Bureau will continue to coordinate with these agencies.

<sup>56</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>41</sup> Black Apr. 2021 Report, *supra* note 7, at 5.

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

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

<sup>44</sup> Black Knight's Mortgage Monitoring forbearance data started January 2020. See Black Knights Mortg. Monitor, *January 2021 Report* (Jan. 2021), [https://cdn.blackknightinc.com/wp-content/uploads/2021/03/BK1\\_MM\\_Jan2021\\_Report.pdf](https://cdn.blackknightinc.com/wp-content/uploads/2021/03/BK1_MM_Jan2021_Report.pdf) (Black Jan. 2021 Report).

<sup>45</sup> *Supra* note 7, at 10.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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

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

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

<sup>51</sup> *Id.*

foreclosure inventory was down 26 percent from the same time last year.<sup>57</sup>

In addition, before the pandemic, foreclosure activity was at half the normal rate.<sup>58</sup> Typically, about 1 percent of loans are in some stage of foreclosure annually.<sup>59</sup> In early 2020, the foreclosure rate was below average at about 0.5 percent.<sup>60</sup> In January 2020, there were about 245,000 loans in the foreclosure process when the pandemic started.

Since the Federal and State moratoria have been in place, most of these borrowers have been protected but are at heightened risk of referral to foreclosure or foreclosure soon after the moratoria end if they do not resolve their delinquency or reach a loss mitigation agreement with their servicer. 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>61</sup> Even where forbearance programs pause or defer payment obligations, they do not necessarily pause delinquency.<sup>62</sup> A

borrower's delinquency may begin or continue during a forbearance period if a periodic payment sufficient to cover principal, interest, and, if applicable, escrow is due and unpaid during the forbearance. Because the forbearance programs offered as a result of the COVID-emergency 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.

As of April 2021, there were still an estimated 1.9 million borrowers in forbearance programs who were more than 90 days behind on their mortgage payments.<sup>63</sup> While the national delinquency rate fell to 4.66 percent in April, it remains about 1.5 percent above its pre-pandemic level.<sup>64</sup>

The Bureau remains focused on borrowers who might be at heightened risk of avoidable foreclosure. The Bureau issued on May 4, 2021, a research brief titled, *Characteristics of Mortgage Borrowers During the COVID-19 Pandemic*, which showed that some borrowers and communities are more at risk than others. The data from the brief showed that borrowers in forbearance or delinquent are disproportionately Black and Hispanic.<sup>65</sup> For example, 33 percent of borrowers in forbearance (and 27 percent of delinquent borrowers) are Black or Hispanic, while only 18 percent of the total population of mortgage borrowers are Black or Hispanic.<sup>66</sup>

Forbearance and delinquency are significantly more common in communities of color (defined as majority minority census tracts) and lower-income communities (defined by census tract income quartiles).<sup>67</sup> If borrowers are displaced from their homes as a result of avoidable foreclosure, it will make homeownership more unattainable in the future, thus potentially widening the wealth divide for this population of borrowers.

#### H. Borrower and Servicer Engagement During the Pandemic

The Bureau is closely monitoring mortgage servicers to determine how they are working with borrowers to

achieve positive outcomes for borrowers during the current crisis.

Among other things, the Bureau has utilized its supervisory authority to obtain current information about servicer activities. For example, in May of 2020, the Bureau began conducting high-level Prioritized Assessments (PA) in response to the pandemic.<sup>68</sup> The PAs were designed to obtain real-time information from an expanded group of supervised entities that operate in markets posing elevated risk of consumer harm due to pandemic-related issues. The Bureau, through its supervision program, analyzed pandemic-related market developments to determine where issues were most likely to pose risk to consumers. Supervision currently is conducting follow-up on the issues covered in the 2020 Prioritized Assessments as well as the current issues related to economic hardships consumers are facing in the ongoing pandemic. This work may be conducted as part of ongoing monitoring, in a supervisory inquiry apart from a scheduled examination, in a scheduled examination, or in some cases, through enforcement. For example, Supervision is reviewing instances where servicers did not implement the CARES Act properly, such as charging fees that are not charged if the borrower made all contractual payments on time, failing to process CARES Act forbearances where borrowers made proper requests for the forbearances, or failing to comply with the Fair Credit Reporting Act's requirements to report the credit obligation or account appropriately. Supervision is conducting oversight to ensure these servicers take timely action to reverse fees, provide full remediation to affected borrowers, and implement processes to promote compliance moving forward.

In March 2021, the volume of overall mortgage complaints to the Bureau increased to more than 3,400 complaints, the greatest monthly mortgage complaint volume since April 2018.<sup>69</sup> Mortgage complaints mentioning forbearance or related terms peaked in April 2020. Since this initial spike and subsequent decrease in May and June 2020, the volume of mortgage forbearance complaints remained steady

<sup>68</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).

<sup>69</sup> Bureau of Consumer Fin. Prot., *Complaint Bulletin: Mortgage forbearance issues described in consumer complaints* (May 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_mortgage-forbearance-issues\\_complaint-bulletin\\_2021-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_mortgage-forbearance-issues_complaint-bulletin_2021-05.pdf).

<sup>57</sup> Black Apr. 2021 Report, *supra* note 7, at 3.

<sup>58</sup> Statista, *Foreclosure rate in the United States from 2005-2020*, (Apr. 15, 2021), <https://www.statista.com/statistics/798766/foreclosure-rate-usa/>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</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>62</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* (Updated June 16, 2020), [https://files.consumerfinance.gov/f/documents/cfpb\\_fcra\\_consumer-reporting-faqs-covid-19\\_2020-06.pdf](https://files.consumerfinance.gov/f/documents/cfpb_fcra_consumer-reporting-faqs-covid-19_2020-06.pdf) (for

further guidance on furnishers' obligations under the FCRA related to the COVID-19 pandemic).

<sup>63</sup> *Supra* note 7 (1.77 million 90-day delinquencies plus 153k active foreclosures).

<sup>64</sup> *Id.* at 3.

<sup>65</sup> CFPB Mortgage Borrower Pandemic Report, *supra* note 5.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

until increasing again in March 2021. The number of borrowers selecting the struggling to pay mortgage issue increased in March and April 2020. That number decreased in the following months. It increased again in 2021 but has only just regained pre-pandemic levels.<sup>70</sup> The Bureau is continuing to monitor complaint data about mortgage servicers.

The Bureau encourages servicers to use all available tools to reach struggling homeowners and to do so in advance of the end of the forbearance period and expects servicers to handle inquiries promptly, to evaluate income fairly, and to work with borrowers throughout the loss mitigation process.

### III. Summary of the Rulemaking Process

On April 5, 2021, the Bureau issued a proposed rule to encourage servicers and borrowers to work together on loss mitigation before the servicer can initiate the foreclosure process. The comment period closed on May 10, 2021.

In response to the proposal, the Bureau received over 200 comments from individual consumers, consumer advocate commenters, State Attorneys General, industry, and others. Many commenters expressed general support for the proposed rule, articulating, for example, the importance of providing clear and consistent information to delinquent borrowers about all of their options. Some commenters expressed general support for the proposed rule and stated that they believed the proposal would give time for borrowers to recover economically and explore loss mitigation options to avoid foreclosure. Some commenters expressed concern about the proposal generally, citing, for example, the proposal's potential economic impact on the housing market and specific industries. The Bureau also received requests from commenters to alter, clarify, or remove specific provisions of the proposed rule, with some focusing on issues relating to current industry practices and capacity and some highlighting the need to ensure consumers have the best information and resources available to them at the most appropriate times. As discussed in more detail below, the Bureau has considered comments that address issues within the scope of the proposed rule in adopting this final rule.

In addition, some commenters expressed the view that the statement that the Bureau, along with other Federal and State agencies, issued on

April 3, 2020 (Joint Statement), and that announced certain supervisory and enforcement flexibility for mortgage servicers in light of the national emergency<sup>71</sup> may undermine the proposed amendments and urged the Bureau to revoke the Joint Statement. The Joint Statement provides that the agencies do not intend to take supervisory or enforcement action against servicers for specified delays in sending certain notices and taking certain actions required by Regulation X. The Joint Statement merely expresses the agencies' intent regarding enforcement and supervision priorities and does not alter existing legal requirements, including a borrower's private right of action under § 1024.41. The Bureau also issued FAQs on April 3, 2020 as a companion to the Joint Statement to provide mortgage servicers with enhanced clarity about existing flexibility in the mortgage servicing rules that they can use to help consumers during the COVID-19 pandemic.<sup>72</sup> Those FAQs state unequivocally that servicers must comply with Regulation X during the COVID-19 pandemic emergency.

In addition, the Bureau recently released a Compliance Bulletin and Policy Guidance (Bulletin) announcing the Bureau's supervision and enforcement priorities regarding housing insecurity in light of heightened risks to consumers needing loss mitigation assistance in the coming months as the COVID-19 foreclosure moratoriums and forbearances end.<sup>73</sup> The Bureau specified that the Bureau intends to continue to evaluate servicer activity consistent with the Joint Statement, provided servicers are demonstrating effectiveness in helping consumers, in accord with the Bulletin.<sup>74</sup> The Bulletin makes clear that the Bureau intends to consider a servicer's overall effectiveness in communicating clearly with consumers, effectively managing borrower requests

for assistance, promoting loss mitigation, and ultimately reducing avoidable foreclosures and foreclosure-related costs. It reiterates that the Bureau intends to hold mortgage servicers accountable for complying with Regulation X with the aim of ensuring that homeowners have the opportunity to be evaluated for loss mitigation before the initiation of foreclosure.

The Bureau believes that the flexibility provided in the Joint Statement and the clarity provided by the FAQs enable servicers to provide borrowers with timely assistance. The Bulletin reinforces the Bureau's expectation that all borrowers are treated fairly and have the opportunity to get the assistance they need. The Bureau believes that these statements of supervisory and enforcement policy are consistent with the final rule. The Bureau will continue to engage in supervisory and enforcement activity to ensure that mortgage servicers are meeting the Bureau's expectations regarding the provision of effective assistance to borrowers and prevention of avoidable foreclosures.

### IV. Legal Authority

The Bureau is finalizing this rule pursuant to its authority under RESPA and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>75</sup> including the authorities, discussed below. The Bureau is issuing this final rule in reliance on the same authority relied on in adopting the relevant provisions of the 2013 RESPA Servicing Final Rule,<sup>76</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 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

<sup>71</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\\_interagency-statement\\_mortgage-servicing-rules-covid-19.pdf](https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_mortgage-servicing-rules-covid-19.pdf).

<sup>72</sup> 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> 86 FR 17897 (Apr. 7, 2021).

<sup>74</sup> News Release, Bureau of Consumer Fin. Prot., *CFPB Compliance Bulletin Warns Mortgage Servicers: Unprepared is Unacceptable* (Apr. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-compliance-bulletin-warns-mortgage-servicers-unprepared-is-unacceptable/>.

<sup>75</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>76</sup> 2013 RESPA Servicing Final Rule, *supra* note 11.

<sup>70</sup> *Id.*



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 final 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. Such a large wave of borrowers could overwhelm servicers, potentially straining servicer capacity and resulting in delays or errors in processing loss mitigation requests.<sup>77</sup> These strains on servicer capacity coupled with potential fiduciary obligations to foreclose could result in some servicers failing to meet required timeline and accuracy obligations as well as other obligations under the existing rule with resulting harm to borrowers.

<sup>77</sup> The Bureau recognizes that other Federal agencies may take steps to protect borrowers from avoidable foreclosures in the aftermath of the pandemic in light of the number of borrowers exiting forbearance and an associated increased need for loss mitigation assistance. The Bureau believes that these efforts would be focused on federally backed mortgage loans. In that event, the final rule may have less impact on those loans. Nevertheless, even in that circumstance, the Bureau believes that the rule is necessary to serve the purposes of RESPA with respect to private mortgage loans.

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 provide new procedural safeguards. 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. 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.

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). Accordingly, in developing the final rule under Dodd-Frank Act section 1032(a), the Bureau has considered available studies, reports, and other evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of

consumer financial products or services.<sup>78</sup>

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.

#### V. Section-by-Section Analysis

##### Section 1024.31 Definitions

##### COVID-19-Related Hardship

The Bureau proposed to define a new term, "a COVID-19-related hardship," for purposes of subpart C. The proposal defined 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.

<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 and solicited comment on available evidence. No commenters provided additional evidence. However, previous research demonstrates that prolonged or excessive stress can impair decision-making and may be associated with reduced cognitive control, including in financial contexts. See, e.g., Katrin Starcke & Matthias Brand, *Effects of stress on decisions under uncertainty: A meta-analysis*, 142 Psych. Bulletin 909 (2016), <https://doi.org/doi/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-19 and their unique impacts on well-being and adherence to public health behaviors*, Soc. Psych. & 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. In addition, the Bureau's assessment of the 2013 RESPA Servicing Final Rule in 2019 analyzed the effects of the early intervention disclosures and found that after the effective date of the early intervention requirements, delinquent borrowers were somewhat more likely than they were pre-Rule to start applying for loss mitigation earlier in delinquency. 2013 RESPA Servicing Rule Assessment Report, *supra* note 11, at 113.



9056(a)(1)). The Bureau solicited comment on this proposed definition.

A few commenters, including some industry commenters and individuals, stated that the definition was too broad and would include individuals with hardships that commenters alleged were not due to the COVID-19 emergency. Others urged the Bureau to adopt a definition that more precisely detailed the amount of financial loss sufficient to constitute a financial hardship.

The Bureau declines to narrow the definition as requested. The Bureau modeled this definition after section 4022 of the CARES Act, which established the forbearance program made available for borrowers with federally backed mortgages. Servicers have utilized this definition since March 23, 2020 when the CARES Act took effect and have experience with its application. A new more tailored definition would be harder for servicers to implement before the rule takes effect.

The Bureau also received a suggestion during its interagency consultation process that the Bureau should tie the definition to the national emergency itself rather than the national emergency as defined in section 4022 of the CARES Act because the covered period of section 4022 of the CARES Act is undefined and the reference to that section may cause confusion. In addition, the March 13, 2020 national emergency referenced in section 4022 of the CARES Act was continued on February 24, 2021.<sup>79</sup> Even though the CARES Act section referenced in the proposal refers to the national emergency declared on March 13, 2020, it is possible that the lack of clarity about the covered period in section 4022 itself may create confusion. The Bureau is revising the definition for clarity.

For the reasons discussed above, the Bureau is finalizing the definition of COVID-19-related hardship to mean a financial hardship due, directly or indirectly, to the national emergency for the COVID-19 pandemic declared in Proclamation 9994 on March 13, 2020 (beginning on March 1, 2020) and continued on February 24, 2021, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)).

<sup>79</sup> Presidential Action, The White House, *Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic* (Feb. 24, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/>.

### Section 1024.39 Early Intervention

#### 39(a) Live Contact

Currently, § 1024.39(a) provides that a servicer must 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 about the availability of loss mitigation options, if appropriate.<sup>81</sup> Current comment 39(a)-4.i clarifies that the servicer has the discretion to determine whether it is appropriate to inform the borrower of loss mitigation options.<sup>82</sup> Current comment 39(a)-4.ii, in part, clarifies that 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>

As discussed below in the section-by-section analysis of § 1024.39(e), the Bureau proposed to add temporary additional early intervention live contact requirements for servicers to provide specific information about forbearances and loss mitigation options during the COVID-19 emergency. The Bureau proposed conforming amendments to § 1024.39(a) and related comments 39(a)-4-i and -ii<sup>85</sup> to incorporate references to proposed § 1024.39(e).

<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.

<sup>85</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 posted on the Bureau's website with the final 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.

As discussed in more detail below and in the section-by-section analysis for § 1024.39(e), generally the comments received on proposed § 1024.39(a) supported the changes to § 1024.39(a) and (e). Among those comments, the Bureau received a couple of comments specific to the proposed amendments to § 1024.39(a). A consumer advocate commenter suggested the Bureau should include additional amendments to § 1024.39(a) commentary to further the goals of and properly incorporate proposed § 1024.39(e). The commenter encouraged the Bureau to amend comment 39(a)-3, which addresses good faith efforts to establish live contact, in light of proposed § 1024.39(e). They also encouraged the Bureau to further amend comment 39(a)-4.ii, which clarifies when the servicer must promptly inform a borrower about the availability of loss mitigation options, to address when the written notice required under § 1024.39(b)(2) may be an alternative for live contact during the period § 1024.39(e) is effective. Additionally, an industry commenter discussed how § 1024.39(e) intersects with the guidance provided in existing comment 39(a)-6, indicating that it felt the Bureau should not require § 1024.39(e) under the circumstances described in comment 39(a)-6.

For the reasons discussed below, the Bureau is adopting the amendments to § 1024.39(a) and commentary as proposed, with additional revisions to comments 39(a)-3 and 39(a)-6 to address certain suggestions raised by commenters or points of clarity, and to make certain conforming changes given the revisions to the foreclosure review period in § 1024.41(f)(3). Currently, comment 39(a)-3 clarifies that good faith efforts to establish live contact for purposes of § 1024.39(a) consist of reasonable steps, under the circumstances, to reach a borrower. Those steps may depend on factors, such as the length of the borrower's delinquency, as well as the borrower's failure to respond to a servicer's repeated attempts at communication. The commentary provides examples illustrating these factors, including that good faith efforts to establish live contact with 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.

Given the length of forbearance programs during the pandemic, the Bureau is revising comment 39(a)-3 to specify that if a borrower is in a

situation such that the additional live contact information is required under § 1024.39(e) or if a servicer plans to rely on the temporary special COVID-19 loss mitigation procedural safeguards in § 1024.41(f)(3)(ii)(C)(1), servicers doing no more than including a sentence in written or electronic communications encouraging the borrower to establish live contact are not taking reasonable steps under the circumstances to make good faith efforts to establish live contact. When making good faith efforts to establish live contact with borrowers in the circumstances described in § 1024.39(e), generally, reasonable steps to make good faith efforts to establish live contact must include telephoning the borrower on one or more occasion at a valid telephone number, although they can include sending written or electronic communications encouraging the borrower to establish live contact with the servicer, in addition to those telephone calls. While the Bureau believes that it should be apparent that if either § 1024.39(e) or § 1024.41(f)(3)(ii)(C) apply, these unique circumstances present factors that differ from the existing guidance in comment 39(a)-3 such that the example would not apply in those cases, the Bureau is persuaded that the revision is necessary to ensure clarity.

The Bureau also believes this clarification as to good faith efforts is appropriate during the unique circumstances presented by the COVID-19 pandemic emergency. As discussed more fully in part II above, the Bureau estimates that a large number of borrowers will be more than a year behind on their mortgage payments, including those in 18-month forbearance programs, and many will have benefited from temporary foreclosure protections due to various State and Federal foreclosure moratoria. As explained in the proposal, to encourage these borrowers to obtain loss mitigation to prevent avoidable foreclosures and given the length of delinquency during these unique circumstances, the Bureau believes that additional efforts are necessary to reach borrowers at this time. Additionally, for the reasons discussed more fully in the section-by-section analysis of § 1024.41(f)(3)(ii)(C), because compliance with § 1024.39(a) during a certain timeframe is one of several temporary procedural safeguards that servicers may rely on to comply with the temporary special COVID-19 loss mitigation procedural safeguards in § 1024.41(f)(3)(ii)(C), the Bureau has concluded that it must be explicitly clear that servicers are required to do

more than provide a sentence encouraging unresponsive borrower contact to prove they have completed the temporary special COVID-19 loss mitigation procedural safeguards. To achieve the goals of § 1024.39(e) discussed in the proposal to Regulation X and the goals of new § 1024.41(f)(3)(ii)(C), in these circumstances presented by the COVID-19 pandemic, good faith efforts to establish live contact require a higher standard of conduct.

For similar reasons, the Bureau is also amending comment 39(a)-6. As identified by a commenter, without revision, current comment 39(a)-6 might be interpreted to allow for a lower standard of ongoing contact than is necessary to assist borrowers in these circumstances. Existing comment 39(a)-6 says, in part, that if the servicer has established and is maintaining ongoing contact with the borrower under the loss mitigation procedures under § 1024.41, the servicer complies with § 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact. The Bureau is revising this comment to add that if a borrower is in a situation such that the additional live contact information is required under § 1024.39(e) or if a servicer plans to rely on the temporary special COVID-19 loss mitigation procedural safeguards in § 1024.41(f)(3)(ii)(C)(1), then certain loss mitigation related communications alone are not enough for compliance with § 1024.39(a). The Bureau is revising the comment to specify that, in these circumstances, the servicer is not maintaining ongoing contact with the borrower under the loss mitigation procedures under § 1024.41 in a way that would comply with § 1024.39(a) if the servicer has only sent the notices required by § 1024.41(b)(2)(i)(B) and § 1024.41(c)(2)(iii) and has had no further ongoing contact with the borrower concerning the borrower's loss mitigation application.

As discussed above, the Bureau believes this higher standard of conduct, which it notes some servicers are already holding themselves to, is necessary under the current circumstances presented by COVID-19 emergency to help ensure that additional efforts are taken to reach delinquent borrowers, including those that are unresponsive. In line with the goals discussed in the proposal for § 1024.39(e), the Bureau believes this revision will help clarify and ensure that borrowers in these circumstances are receiving ongoing communication about loss mitigation options, whether it be through live contact communications or through completion of a loss

mitigation application and reasonable diligence requirements. The Bureau believes this revision will help to prevent instances where borrowers miss opportunities to submit loss mitigation applications because they only receive loss mitigation information at the beginning of their forbearance program, and no other contact until foreclosure is imminent. However, the Bureau is not removing this guidance altogether. As discussed by the commenter and explained in the 2014 RESPA Servicing Proposed Rule<sup>86</sup>, the Bureau believes when done properly, established and ongoing loss mitigation communication that is maintained can work as well as live contact to encourage and help borrowers file loss mitigation applications earlier in the forbearance program or delinquency, timing which is beneficial to both the servicer and the borrower under the current circumstances.

The Bureau is not further revising comment 39(a)-4.ii as suggested by a consumer advocate commenter. Comment 39(a)-4.ii provides, in part, that, 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. The existing requirement in § 1024.39(a) to inform a borrower about the availability of loss mitigation options that this comment references is separate from the new information requirements in § 1024.39(e). Nothing in the existing rule would prevent compliance with both the option to inform these borrowers about the availability of loss mitigation options as provided in comment 39(a)-4.ii and the requirement to provide these borrowers the specified additional information in § 1024.39(e) promptly after establishing live contact.

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

As discussed more fully above in the section-by-section analysis of § 1024.39(a), currently, a servicer must 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>87</sup> Promptly after establishing live contact, the servicer

<sup>86</sup> 79 FR 74175, 74199-74200 (Dec. 15, 2014).

<sup>87</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).

must inform the borrower about the availability of loss mitigation options, if appropriate.<sup>88</sup>

#### The Bureau's Proposal

The Bureau proposed 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. These temporary requirements would have applied for one year after the effective date of the final rule. In general, proposed § 1024.39(e)(1) would have required servicers to ask whether borrowers not yet in a forbearance program at the time of the live contact were 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, for borrowers in forbearance programs at the time of live contact, proposed § 1024.39(e)(2) would have required servicers to 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 would need to take to be evaluated for such options during the last required live contact made before the end of the forbearance period. For the reasons discussed below, the Bureau is finalizing § 1024.39(e) generally as proposed, with some revisions to address certain comments received, including revisions to the sunset date of this provision, adding a requirement to provide certain housing counselor information, revising the requirement that the servicer ask the borrower to assert a COVID-19-related hardship, and revising the applicable time period when the servicer must provide the additional information to borrowers who are in a forbearance program.

#### Comments Received

In response to proposed § 1024.39(e), the Bureau received comments from trade associations, financial institutions, consumer advocate commenters, government entities, and individuals. Some commenters opposed the provision entirely. A few industry commenters asserted the proposal was unnecessary, stating that servicers were already performing the proposed requirements and the proposal duplicated most GSE and FHA requirements. Additionally, a few industry commenters asserted that, instead of adding § 1024.39(e), the

Bureau should rely on existing § 1024.39(a) requirements and provide COVID-19-specific examples in the commentary to explain how those provisions apply under the current circumstances.

However, in general, a majority of commenters that addressed proposed § 1024.39(e) supported the proposed amendments. Some industry commenters provided general support. Other commenters, industry and otherwise, supported proposed § 1024.39(e) but requested certain revisions. Below is a discussion of comments received on the overall proposed requirements in § 1024.39(e). See the section-by-section analyses of § 1024.39(e)(1) and (2) for a discussion of comments received relating to each of those specific proposed provisions.

*Concerns about balancing borrower access to information and servicer discretion.* Several commenters discussed how proposed § 1024.39(e) would affect the balance between borrower access to information as they make loss mitigation decisions and servicer discretion in how to facilitate borrower understanding and prevent confusion. Several industry commenters and trade groups expressed the desire that the Bureau continue to provide servicers with discretion as to which forbearance options and other loss mitigation options are listed and described to borrowers promptly after live contact is established, even as it applies to the information required under § 1024.39(e). The commenters expressed concern that if servicers provided information about all available forbearance options or other loss mitigation options, it may be overwhelming. Additionally, those commenters indicated that providing information about all available forbearance options and loss mitigation options may cause borrower frustration during the loss mitigation application process. For example, commenters asserted that, while certain loss mitigation options may be available, review processes, such as investor "waterfall" requirements, may mean not all available options are offered to the borrower. Further, the commenters indicated eligibility and availability of forbearance options and other loss mitigation options may change after the live contact, particularly if the borrower is on the cusp of certain criteria, such as delinquency length, at the time of the live contact.

In contrast, several consumer advocate commenters and an industry commenter indicated that borrowers would benefit from receiving a list and brief description of all available

forbearance options and other loss mitigation options during early intervention and requested that the Bureau require additional information in some cases. For example, a couple of commenters asserted that, not only should servicers be required to provide all forbearance and loss mitigation options available to the borrower, they should also be required to provide all possible forbearance and loss mitigation options, regardless of availability to the borrower. The commenters that supported requiring servicers to provide all available forbearance options and other loss mitigation options during early intervention cited concerns that servicer staff may not be properly trained to accurately identify which loss mitigation options are appropriate for the borrower, and provided qualitative evidence of servicer staff providing inaccurate forbearance and other loss mitigation information. These commenters also indicated that unless borrowers receive information about all available loss mitigation options, if not all loss mitigation options, they may not have all necessary information to determine and advocate for the best loss mitigation solution for their particular situation.

Both sets of comments reiterate concerns discussed in the section-by-section analysis of proposed § 1024.39(e). The Bureau is aware of evidence supporting assertions that some servicers are providing consistent and accurate information, but also evidence that some borrowers are not receiving consistent and accurate information as they seek loss mitigation assistance during the pandemic.<sup>89</sup> The Bureau is not persuaded that providing the borrower with information on all possible loss mitigation options, regardless of whether those options are available to the borrower, is beneficial. The Bureau agrees that it is essential at this time to provide the borrower with as much loss mitigation information as possible to support borrowers in their decisions as to how to address their delinquency in a way that is best for their situation. Nevertheless, the Bureau believes providing all possible loss mitigation options, even those that are not applicable to the borrower, would increase borrower confusion.

However, the Bureau is also not persuaded that allowing complete servicer discretion as to which, if any, specific loss mitigation options are discussed is sufficient in the current crisis. The concerns about servicers sometimes providing inconsistent and inaccurate information during this

<sup>88</sup> 12 CFR 1024.39(a).

<sup>89</sup> 86 FR 18840 at 18851 (Apr. 9, 2021).

critical period for loss mitigation assistance seem only more likely to continue or increase as the expected volume of borrowers needing the assistance increases. Further, the anticipated forthcoming expiration of many COVID-19-related programs may also contribute to these concerns, as fast-paced or frequent changes in loss mitigation program availability or criteria have been noted to cause some consistency and accuracy issues with some servicers. For these reasons, the Bureau concludes that the information required under final § 1024.39(e)(1) and (2), as discussed in more detail in the section-by-section analyses of those provisions below, strikes the correct balance during of the pandemic.

*Require information in a written disclosure.* Certain consumer advocate commenters, industry commenters, and State government commenters requested the Bureau consider requiring new written disclosures as part of the proposed early intervention amendments. A consumer advocate commenter and a State government group suggested the Bureau require the additional content in proposed § 1024.39(e) to be provided in a written notice or added to the existing 45-day written notice requirements in § 1024.39(b). An industry group and a State government group suggested that the Bureau add written pre-foreclosure notice requirements, similar to those in New York, Iowa, and Washington.

The Bureau is not finalizing any new written disclosures or amendments to existing written disclosure requirements. Given the expedited timeframe and urgent necessity for this rulemaking, there is not sufficient time to complete consumer testing to help ensure any new or updated required disclosures would sufficiently assist borrowers, rather than contributing to any confusion. Additionally, the Bureau believes adding new written disclosure requirements at this time could be harmful to borrowers during the unique circumstances presented by the COVID-19 emergency, as servicers would need to spend time and resources implementing those disclosures, rather than focusing their time and resources on assisting borrowers quickly. Given the upcoming expected surge in borrowers exiting forbearance, the Bureau believes those resources are better spent assisting borrowers. The Bureau notes that nothing in the rule prevents servicers from listing and briefly describing specific loss mitigation options available to the borrower in the existing 45-day written notice or from adding any additional

information to the notice.<sup>90</sup> In addition, the rule does not prevent a servicer from following-up on its live contact with specific information in a written communication.<sup>91</sup>

*Require provision of HUD homeownership counselors or counseling organizations list.* Several consumer advocate commenters and State Attorneys General commenters suggested the Bureau should require servicers to provide information to borrowers about the Department of Housing and Urban Development (HUD) homeownership counseling as part of the additional information required by proposed § 1024.39(e). Commenters stated that homeownership counselors are often able to assist borrowers that mistrust their servicer, or have difficulty understanding their options or how to submit a loss mitigation application.

The Bureau is persuaded that some borrowers may benefit from homeownership counselor assistance during the pandemic. However, given commenter concerns about the amount of information required by § 1024.39(e) that servicers must convey promptly after establishing a live contact, the Bureau does not believe provision of detailed homeownership counselor contact information during the live contact would be beneficial to borrowers in these circumstances. Instead, the Bureau is persuaded that borrowers may benefit from a reference to where they can access homeownership counselor contact information. Thus, as discussed more fully in the section-by-section analyses of § 1024.39(e)(1) and (2), the Bureau is adding a requirement that the servicer must identify at least one way that the borrower can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement. Other examples servicers may choose to reference include, for example, the Bureau's website, HUD's website, or the 45-day written notice required by § 1024.39(b), but the servicer need only include one reference. By requiring that servicers identify at least one way that the borrower can find contact information for homeownership counseling services, the Bureau believes it will remind borrowers, especially those who believe they would benefit from homeownership counselor assistance, of

where this information is located and how they may access it. Additionally, this requirement may help address concerns about servicer resource capacity, as discussed in the proposal, given that homeownership counselors can help answer borrower's questions regarding their loss mitigation options. The Bureau notes that servicers are already required to provide certain information about homeownership counseling to borrowers,<sup>92</sup> and that servicers may comply with this provision by referencing existing disclosures, further minimizing servicer burden.

*Exempt federally backed mortgages.* One industry trade group requested the Bureau exempt "federally backed" mortgage loans from proposed § 1024.39(e). The commenter indicated that these mortgages are already subject to Federal investor or other Federal guarantor requirements that are similar to or more extensive than those proposed.

The Bureau is not persuaded that exempting federally backed mortgages from the § 1024.39(e) requirements is necessary. The Bureau believes final § 1024.39(e) does not conflict with GSE or FHA requirements and does not add additional burdens on servicers of those loans. Further, the Bureau also believes exempting federally backed mortgages from this provision may add unnecessary implementation complexity that may affect the ability of servicers to provide critical assistance to borrowers at this time.

*Require translation for limited English proficiency borrowers.* A consumer advocate commenter and a State Attorney General commenter advocated for adding a translation requirement to proposed § 1024.39(e) to assist limited English proficiency borrowers. The Bureau is not revising § 1024.39(e) to require translation for limited English proficiency borrowers. In the interest of issuing the final rule on an expedited basis to bring relief as soon as possible to the largest number of borrowers, the Bureau did not undertake to incorporate a requirement to provide disclosures in languages other than English or to incorporate model forms in other languages. This does not mean the Bureau will or will not take that step in a future rulemaking. Additionally, Regulation X permits servicers to provide disclosures in languages other than English.<sup>93</sup> The Bureau both permits and encourages servicers to ascertain the language preference of their borrowers, when done in a legal manner

<sup>90</sup> Comment 39(b)(1)-1 states, in part, that a servicer may provide additional information that the servicer determines would be helpful.

<sup>91</sup> For example, comment 39(a)-4.ii states, in part, that a servicer may inform borrowers about the availability of loss mitigation options orally, in writing, or through electronic communication promptly after the servicer establishes live contact.

<sup>92</sup> See, e.g., 12 CFR 1026.41(d)(7)(v).

<sup>93</sup> See 12 CFR 1024.32(a)(2).

and without violating the Equal Credit Opportunity Act or Regulation B, to be responsive to borrower needs during this critical time for borrower communication.<sup>94</sup> The Bureau will be providing on its website a Spanish language translation of Appendix MS-4 of Regulation X that servicers may use, as permitted by applicable law.

*Electronic media use for live contacts.* A consumer advocate commenter and State Attorney General commenter requested the Bureau provide guidance about which electronic communication media satisfy the live contact requirements. The Bureau has previously declined to require or explicitly permit certain methods of electronic media for required communications under the mortgage servicing rules, stating it believes it would be most effective to address the use of such media after further study and outreach to enable the Bureau to develop principles or standards that would be appropriate on an industry-wide basis.<sup>95</sup> Similarly now, the Bureau is not finalizing language in the rule to discuss specific electronic media use for early intervention live contact requirements, but notes that certain electronic media, such as live chat functions, can, in certain circumstances, be compared to telephone or in-person conversations that are permitted as live contact under the rule.

*Sunset date.* A few commenters discussed the sunset date for proposed § 1024.39(e). These commenters generally supported having a sunset date. However, they differed about whether the proposed August 31, 2022 sunset date was the appropriate choice. A government commenter and an industry commenter supported the existing sunset date, suggesting it was long enough, with one indicating it should not be shortened. Conversely, another industry commenter asserted the proposed sunset date conflicted with certain existing GSE requirements and requested the sunset date correlate with the emergency declaration or COVID-19-related forbearance program end dates. The Bureau also received a suggestion during its interagency consultation process to revise the sunset

date to June 30, 2022, the anticipated end date of certain Federal COVID-19-related forbearance programs.

The Bureau is persuaded a sunset date for § 1024.39(e) is appropriate and provides servicers with certainty as to how long they are required to provide the additional information during live contacts. However, the Bureau is revising the sunset date to better align with the pandemic, rather than the effective date of this final rule. The Bureau is persuaded that aligning the sunset of § 1024.39(e) more closely to the pandemic is necessary to prevent conflicts between § 1024.39(e) and pandemic-related investor or guarantor requirements, such as those related to additional communications and loss mitigation options.

As such, § 1024.39(e) will sunset on October 1, 2022. The Bureau anticipates that COVID-19-related forbearance programs will be offered through at least September 30, 2021, and anticipates that most borrowers utilizing the full 360 days offered under the CARES Act will exit forbearance by September 30, 2022. Once COVID-19-related forbearance programs expire and borrowers exit the applicable forbearance programs, the circumstances that warranted the additional information in § 1024.39(e) will no longer apply. The Bureau anticipates that will occur sometime after September 30, 2022, but there is significant uncertainty about exactly when such programs will expire. Taking that uncertainty into consideration, to best ensure a sufficient period of coverage, the Bureau concludes that it is appropriate to extend the proposed sunset date. The Bureau notes that the final sunset date will align with the mandatory compliance date for the final rule titled Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): General QM Loan Definition (General QM Final Rule). The Bureau recently extended, that mandatory compliance date, in part, to preserve flexibility for consumers affected by the COVID-19 pandemic and its economic effects. As similarly noted in that rule, the Bureau will continue to monitor for any unanticipated effects of the COVID-19 pandemic on market conditions to determine if future changes are warranted.

While commenters suggested the Bureau could tie the sunset date to the end of these loss mitigation programs, the Bureau believes that, because investors and guarantors may differ as to when their respective pandemic-related requirements will expire, it will simplify compliance for the requirements to sunset on a universal

date. The Bureau believes this change to the sunset date will address comments indicating the proposed date conflicted with guidance from other agencies. Additionally, the Bureau believes this change will address commenter concerns that the provision should sunset with the circumstances of the pandemic. Further, the Bureau believes this time period is necessary to allow servicers to reach most borrowers. While, as discussed above in part II, the anticipated surge and largest amount of strain on servicer resources is expect to begin to decline after January 1, 2022, the volume of borrowers expected to exit forbearance each month will remain high beyond that date and the unique circumstances of the pandemic, including the unusually long delinquencies, will persist. The Bureau concludes the sunset date for § 1024.39(e) must cover both the expiration of COVID-19-related forbearance programs, which would be relevant for the requirements for § 1024.39(e)(1), and also borrowers exiting COVID-19-related forbearance programs who entered on the last possible day and utilized a full 12 months of forbearance, which would be relevant for the requirements in § 1024.39(e)(2). To cover both groups of borrowers, and particularly to reach all borrowers exiting the relevant forbearance programs discussed in § 1024.39(e), the Bureau believes it is necessary to extend this provision beyond the anticipated surge of borrowers existing forbearance, unlike other provisions in this rule.

#### Final Rule

As discussed in more detail in the section-by-section analyses of § 1024.39(e)(1) and (2) below, the Bureau is finalizing § 1024.39(e) generally as proposed, with some revisions to address certain comments received, including revisions to the sunset date of this provision, adding a requirement to provide certain homeownership counseling information, revising the requirement that the servicer ask the borrower to assert a COVID-19-related hardship, and revising the applicable time period when the servicer must provide the additional information to borrowers who are in a forbearance program. The Bureau believes the addition of § 1024.39(e) will help encourage and support borrowers in seeking available loss mitigation assistance during this unprecedented time. Section 1024.39(e) temporarily requires servicers to provide specific additional information to certain delinquent borrowers promptly after establishing live contact.

<sup>94</sup> See Bureau of Fin. Prot., *Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency* (Jan. 13, 2021), <https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/open-notice-statement-regarding-the-provision-of-financial-products-and-services-to-consumers-with-limited-english-proficiency/>; 86 FR 6306 (Jan. 13, 2021). See also 82 FR 55810 (Nov. 20, 2017).

<sup>95</sup> See, e.g., 78 FR 10695, 10745 (Feb. 14, 2013) (discussing the suggestion to require establishing electronic portals for intake of notices of error under § 1024.35(c)).

As revised, the requirements apply until October 1, 2022.

The Bureau notes that this final rule does not change the scope of any current live contact requirements more generally under § 1024.39(a). Thus, the Bureau reiterates that § 1024.39(e) does not apply if the borrower is current. The Bureau also notes that nothing in the rule prevents a servicer from providing additional information than what is required under the rule to borrowers about forbearance programs or other loss mitigation programs. For example, if the forbearance program may end soon after the live contact is established, has certain eligibility criteria, or is subject to investor “waterfall” review procedures, a servicer may choose to discuss that information with the borrower to attempt to prevent confusion.

Additionally, both § 1024.39(e)(1) and (2) require servicers to provide a list of forbearance programs or loss mitigation programs made available by the owner or assignee of the borrower’s mortgage loan to borrowers experiencing a COVID-19-related hardship. The list of forbearance programs is limited to only those that are available at the time the live contact is established. The Bureau has added language to both sections to clarify this timing limitation. If a forbearance program or loss mitigation program is no longer available at the time of the live contact, the servicer need not include that forbearance program or loss mitigation program in the list.

If a borrower’s COVID-19-related hardship would not meet applicable eligibility criteria for a forbearance program or a loss mitigation program, the servicer also need not include that in the lists required by § 1024.39(e)(1) or (2). However, the Bureau reiterates that the required information under § 1024.39(e) is not limited to forbearance programs or loss mitigation programs specific to COVID-19 or only available during the COVID-19 emergency. The servicer must provide information about COVID-19-specific programs, as well as any generally available programs where COVID-19-related hardships are sufficient to meet the hardship-related requirements for the program. Further, the servicer must inform the borrower about program options made available by the owner or assignee of the borrower’s mortgage loan regardless of whether the option is available based on a complete loss mitigation application, an incomplete application, or no application, to the extent permitted by this rule. Finally, the existing rule provides guidance as to what constitutes a brief description and

the steps the borrower must take to be evaluated for loss mitigation options.<sup>96</sup>

#### 39(e)(1)

##### The Bureau’s Proposal

Proposed § 1024.39(e)(1) would have temporarily required 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 forbearance program available to borrowers experiencing a COVID-19-related hardship. In those circumstances, proposed § 1024.39(e)(1) would have required that the servicer ask if the borrower is experiencing a COVID-19-related hardship. If the borrower indicated they were experiencing a COVID-19-related hardship, proposed § 1024.39(e)(1) would have required 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 would need to take to be evaluated for such forbearance programs. For the reasons discussed below, the Bureau is finalizing § 1024.39(e)(1) generally as proposed, with some revisions to address certain comments received, including removing the requirement that the servicer ask whether the borrower is experiencing a COVID-19-related hardship, and adding a requirement to provide certain housing counselor information.

##### Comments Received

Commenters generally supported proposed § 1024.39(e)(1). One industry commenter opposed this provision overall, asserting servicers were already performing the requirements proposed in § 1024.39(e)(1) and that adding new regulatory requirements at this time will further strain servicer capacity. Of those that supported the proposal, commenters generally suggested certain scope and content revisions, discussed below.

*Scope.* Several commenters discussed which borrowers would benefit from proposed § 1024.39(e)(1) requirements. A consumer advocate commenter and an individual supported the proposed requirement that the servicer ask the borrower to assert a COVID-19-related hardship. A consumer advocate commenter suggested that the requirements should instead apply to all delinquent borrowers not yet in forbearance, not just those that assert a COVID-19-related hardship. This

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

comment asserted that requiring § 1024.39(e)(1) information for all such delinquent borrowers removes the onus from borrowers to identify whether their hardship qualifies as COVID-19-related. A few industry commenters asserted that servicers should have discretion to determine whether the borrower has a COVID-19-related hardship, rather than asking the borrower. Further, as discussed above in the section-by-section analysis for the definition of COVID-19-Related Hardship in § 1024.31, commenters expressed concern about servicer and borrower understanding of the term and ability to accurately implement its use.

The Bureau is persuaded it should remove the requirement that servicers ask borrowers whether they are experiencing a COVID-19-related hardship, and instead require servicers to provide certain information under § 1024.39(e)(1) to delinquent borrowers during the period the provision is effective unless the borrower asserts they are not interested. The Bureau indicated in the proposal that it was considering expanding this provision to all delinquent borrowers not in forbearance at the time live contact is established. As mentioned by commenters and in the proposal, borrowers may not know or may be more hesitant to assert that their hardship qualifies as a COVID-19-related hardship. This seems particularly applicable to the borrowers that have not yet obtained forbearance assistance. As discussed in the proposal, the Bureau believes these borrowers may not yet have taken advantage of the offered forbearance programs because they may be more hesitant to assert hardship, may not fully trust their ability to receive assistance, or may not understand whether their hardship is COVID-19-related. By removing the requirement that borrowers take action to receive the information, and instead requiring that borrowers take action to be excluded, the rule helps to ensure that borrowers are not missing beneficial information due to any misunderstanding or hesitancy, reducing the likelihood that target borrowers may miss this important information.

However, the Bureau is also persuaded by commenters that some delinquent borrowers may not benefit from receipt of this information. Thus, the final rule continues to provide a method for borrower-initiated exclusion. Unlike the proposal, the final rule will require borrowers to state that they are uninterested in receiving information about the available forbearance programs. In doing so, the

Bureau continues to narrow the applicability of the provision to those borrowers most likely to be experiencing a COVID-19-related hardship, without requiring borrowers who are uncertain or hesitant to opt-in to receiving this information. The Bureau believes borrowers who are certain they do not have a COVID-19-related hardship are likely to assert they do not need the additional information in § 1024.39(e)(1). Borrowers that are certain they have a COVID-19-related hardship or are unsure will likely not take such action, unless they are uninterested forbearance program assistance. For those borrowers that are unsure, the Bureau believes that receiving this information likely will clarify whether their hardship qualifies as COVID-19-related and will be beneficial even if ultimately the borrower does not meet the required hardship criteria. Further, the Bureau does not believe that requiring an assertion to be excluded, rather than an assertion to be included, is likely to increase the probability of borrower confusion. As with the proposal, the information seems equally likely to be received by only those borrowers that may have a COVID-19-related hardship.

*Content.* A few consumer advocate commenters indicated the Bureau should expand § 1024.39(e)(1) to require servicers to inform the borrower of all possible or available loss mitigation options, not just the available forbearance options. The commenters assert that while forbearance may be beneficial for some borrowers, some delinquent borrowers may have stabilized their income and may be ready for more permanent loss mitigation options. The commenters also assert, as discussed above in the section-by-section analysis for § 1024.39(e), that borrowers may benefit from the knowledge of all possible loss mitigation options, rather than those options only available to them.

The Bureau is not persuaded that the current unique circumstances presented by the COVID-19 emergency warrant requiring servicers to inform delinquent borrowers who are not yet in a forbearance program about all possible or available loss mitigation options. First, the Bureau is not persuaded that it would be beneficial to expand the content discussed to include options beyond forbearance programs. The Bureau believes that forbearance programs at this time are beneficial to delinquent borrowers, given they can provide borrowers with additional time to recover from their hardships, develop a financial plan, and apply for permanent loss mitigation.

Additionally, limiting the required information to just forbearance options first can help prevent borrowers not yet in forbearance from becoming overwhelmed with information, a concern noted by commenters as discussed above. Further, the content required by § 1024.39(e)(1) does not replace the existing live contact requirements in § 1024.39(a), which require that, promptly after establishing live contact with a borrower, the servicer must inform the borrower about the availability of loss mitigation options, if appropriate. Thus, in some cases, it may be appropriate for servicers to inform certain borrowers, such as those who indicate that they have resolved their hardship, about the availability of additional loss mitigation options in addition to the information required in § 1024.39(e)(1). Second, the Bureau is not persuaded that the options discussed should be all possible options, whether or not available to the borrower through the owner or assignee of the mortgage. The potential for increased borrower confusion or frustration outweighs any potential benefit this knowledge may provide the borrower.

#### Final Rule

For the reasons discussed in this section and in more detail below, the Bureau is finalizing § 1024.39(e)(1) generally as proposed with some revisions to address certain comments received. The Bureau believes § 1024.39(e)(1), as revised, will help encourage borrowers not yet in forbearance to work with their servicer under these unique circumstances and avoid unnecessary foreclosures.

For the reasons discussed above, the Bureau is revising § 1024.39(e)(1) to remove the requirement that servicers ask borrowers whether they are experiencing a COVID-19-related hardship before being providing the additional forbearance program information. Instead, the Bureau is finalizing § 1024.39(e)(1) such that all delinquent borrowers not yet in forbearance at the time live contact is established will receive notification that forbearance programs are available by the owner or assignee of the borrowers' mortgage loan to borrowers experiencing COVID-19-related hardships. To provide this information, the servicer need not use the exact language in the regulation, and may find a more plain-language method, such as informing the borrower that there are forbearance programs available if they are having difficulty making their payments because of COVID-19. Unless the borrower states they are not

interested, servicers are then required to provide a list and brief description of such forbearance programs, as well as the actions the borrower must take to be evaluated for such forbearance programs. In addition to the guidance discussed above in the section-by-section analysis for § 1024.39(e) more generally, the Bureau notes that particular to § 1024.39(e)(1), the forbearance programs that servicers must identify also include more than just short-term forbearance programs as defined in the mortgage servicing rules.<sup>97</sup> Additionally, as discussed above, the Bureau is also requiring servicers to identify at least one way that the borrower can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement.

#### 39(e)(2)

#### The Bureau's Proposal

Proposed § 1024.39(e)(2) would have temporarily required 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, it would have required the servicer to provide the borrower with the date the borrower's current forbearance program ends. Second, it would have required the servicer 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. It also would have required the servicer 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 have required 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. For the reasons discussed below, the Bureau is finalizing § 1024.39(e)(2) generally as proposed, with some revisions to address certain comments received, including revising the timing for when this information is provided, and adding a requirement to provide certain housing counselor information.

<sup>97</sup> Existing § 1024.41(c)(2)(iii) and comment 41(c)(2)(iii)-1 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.



## Comments Received

Commenters generally supported proposed § 1024.39(e)(2). One industry commenter opposed this provision overall, asserting servicers were already performing the requirements proposed in § 1024.39(e)(2), and that adding new regulatory requirements at this time will further strain servicer capacity. Of those that supported the proposal, commenters generally suggested certain scope, content, and timing revisions, discussed below.

*Scope.* A few commenters discussed the scope of § 1024.39(e)(2). One individual commenter suggested the requirements in § 1024.39(e)(2) should apply to all delinquent borrowers during the time period, rather than just those in forbearance programs made available to borrowers experiencing a COVID-19-related hardship at the time of the live contact. A couple of industry commenters suggested the Bureau should exempt borrowers that voluntarily exit the forbearance program early.

The Bureau is not persuaded that the current pandemic warrants expanding the scope of § 1024.39(e)(2) to all delinquent borrowers. Delinquent borrowers not yet in forbearance will receive additional information under this final rule, as provided in § 1024.39(e)(1). As discussed above, the Bureau is persuaded that providing such borrowers with forbearance information first provides additional time for borrowers to then seek loss mitigation assistance and develop a financial plan. Further, the Bureau notes that the requirements in § 1024.39(e) are in addition to the existing requirement in § 1024.39(a). Thus, even if a delinquent borrower is not in forbearance at the time live contact is established, if appropriate, a servicer is already required to inform the borrower about the availability of loss mitigation options.

The Bureau is also not persuaded that an exemption from § 1024.39(e)(2) is necessary for borrowers that exit forbearance programs early. First, § 1024.39(e)(2), and § 1024.39(a) more broadly, only apply to delinquent borrowers. It seems likely that if a borrower is voluntarily exiting forbearance early, it is because the borrower has the ability to bring the account current and the hardship has ended. If the borrower was current at the time the forbearance was scheduled to end, § 1024.39(e)(2), as revised, would not apply because § 1024.39(a) would not apply. If, however, a borrower exited forbearance early but remained delinquent, the Bureau

believes that borrower would still benefit from the loss mitigation information required by § 1024.39(e)(2) and thus, it should still apply.

*Content.* Several consumer advocate commenters requested the Bureau require servicers to provide information to borrowers about all possible loss mitigation options, not just those that are available. These commenters supported the Bureau in limiting servicer discretion. Some indicated borrowers benefit from receiving information about all possible loss mitigation options, even if not applicable, because it allows borrowers to better identify mistakes in information they receive. The commenters also asserted that available loss mitigation options should include those that the borrower is eligible for even if the investor “waterfall” requirements may prevent the borrower from being offered a particular option. Conversely, feedback during an interagency consultation and a few industry commenters expressed concern about requiring servicers to provide all loss mitigation options available to the borrower. These commenters cited concerns about borrower confusion. They indicated that providing options that may not be available after review of the loss mitigation application due to investor “waterfall” requirements and changes in borrower eligibility after the live contact may confuse borrowers or make them believe they were provided with inaccurate information. Some of these commenters requested that the Bureau give servicers discretion to determine which loss mitigation options are appropriate for discussion, rather than listing all available loss mitigation options, or allow generalized statements that loss mitigation options are available.

As discussed in the proposed rule and above in the section-by-section analysis for § 1024.39(e), the Bureau believes that information about specific loss mitigation options is crucial for borrowers at this time. Additionally, the Bureau believes that providing all borrowers exiting forbearance with consistent information about loss mitigation options made available by the owner or assignee of their mortgage loan will address concerns about consistency and accuracy with respect to pandemic-related loss mitigation information.

As discussed above, the Bureau is not persuaded it should expand the information provided to include all possible loss mitigation options or that it should allow servicers to exercise discretion about what information to share. As stated above, the Bureau is

persuaded by the comments that the proposed approach appropriately balances providing the borrower transparency as to which loss mitigation options the borrower may reasonably expect to potentially be reviewed for, with the need to prevent borrower confusion. Because the options provided are only those that might be available to the borrower, rather than all options that the owner or assignee makes available to any borrowers, the Bureau believes this will sufficiently tailor the information to the borrower’s particular situation. Additionally, because the rule requires only a brief description, as discussed further below, rather than a full review of the loss mitigation program, there will not be an overwhelming amount of information provided.

With regard to concerns about investor waterfall requirements, the Bureau is not persuaded these concerns and the potential implications on borrower understanding justify eliminating the potential benefit of the provision of information about all of the types of forbearance extension, repayment options, and other loss mitigation options made available to the borrower by the owner or assignee of the borrower’s mortgage loan at the time of the live contact. However, as noted above, if a servicer believes that a borrower may be confused by the investor’s waterfall requirements and the impact they may have on the loss mitigation options offered to the borrower, nothing in the rule would prevent a servicer from providing additional information to assist the borrower in understanding how an evaluation “waterfall” may affect the loss mitigation options for which a borrower is reviewed and ultimately offered. The Bureau encourages this type of transparency in communications.

*“Last live contact” timing.* Several commenters discussed the proposed requirement that servicers convey the information required by § 1024.39(e)(2) during the last live contact made pursuant to existing § 1024.39(a) that occurs before the end of the loan’s forbearance program. These commenters supported proposed § 1024.39(e)(2) overall but suggested different timing than the “last live contact.” Several industry commenters suggested the Bureau require servicers to provide the information during the last live contact that is no later than 30 days before the scheduled end of the forbearance program, ensuring the information is not provided on the last day of the forbearance program and noting that the scheduled end date provides more

certainty for servicers. One industry commenter indicated that the last live contact is too late, and that the information should be provided earlier in the forbearance program. A few consumer advocate commenters suggested the Bureau should require that the contact occur 45 days before the end of forbearance. Further, some commenters suggested the last live contact should be tied to the scheduled end of forbearance programs, not the actual end date, citing that consumers may voluntarily leave programs early or may extend their forbearance program, effectively changing the actual end date.

Additionally, a few commenters suggested that the information required under proposed § 1024.39(e)(2) should be provided in more than one live contact. A few consumer advocate commenters suggested the information be provided during all live contacts established during the forbearance program. One consumer advocate suggested the information be provided during the live contact established at the start of the forbearance program, in addition to the last live contact. One State Attorney General commenter suggested the information be provided during the live contact that is established immediately after final rule issuance, as well as the last live contact.

The Bureau is persuaded by the comments that it should revise § 1024.39(e)(2) to clarify when servicers must provide the information required by § 1024.39(e)(2). First, the Bureau agrees with commenters that the timing should be tied to the scheduled end of the forbearance program, rather than the actual end date. As discussed above, the Bureau recognizes that some borrowers may extend their forbearance programs and others may voluntarily exit before the scheduled end date. The Bureau concludes that providing this information based on the scheduled end date is beneficial for borrowers that extend their forbearance program, so that they will receive this information each time they extend their forbearance program.

Second, the Bureau declines to require servicers to provide the information required by § 1024.39(e)(2) to borrowers earlier in the forbearance program or more than one time. As discussed in the proposal, the Bureau believes providing this information towards the end of forbearance programs better aligns with current borrower behavior patterns, given economic uncertainty and the impact foreclosure moratoria may have their sense of urgency, potentially increasing

the effectiveness of the messaging.<sup>98</sup> In addition, the Bureau is concerned that requiring this information too early before the scheduled end date of the forbearance program may not align with existing investor requirements, a timing misalignment which may require duplicated efforts by servicers to contact with borrowers, burdening servicers and potentially confusing borrowers. However, the Bureau agrees that the servicer should provide this information before the final day of the borrower's forbearance program. The Bureau does not believe it is necessary to require this information under § 1024.39(e)(2) in additional instances, such as at the beginning of forbearance programs or during the live contact established immediately after the effective date of this final rule. Most borrowers have already started the relevant forbearance programs, and for those yet to begin forbearance programs, servicers are already required under the servicing rules to provide a written notice to borrowers promptly after offering a borrower a short-term payment forbearance program based on the evaluation of an incomplete application.<sup>99</sup> Additionally, the Bureau is concerned that requiring servicers to provide the additional information at the effective date for all accounts would overwhelm servicer capacity at a critical moment.

Thus, to balance the timing considerations, the Bureau is revising § 1024.39(e)(2) to clarify that servicers must provide the additional information during the live contact that occurs at least 10 days and no more than 45 days before the scheduled end of the forbearance program. The Bureau recognizes that this approach may mean that certain borrowers exiting forbearance near the effective date of this final rule could be missed. As a result, the Bureau is amending this provision to require servicers to provide the additional information during the

<sup>98</sup> 86 FR 18840, 18849–18850 (Apr. 9, 2021).

<sup>99</sup> 12 CFR 1024.41(c)(2)(iii) requires servicers promptly after offering a short-term payment forbearance program to provide borrowers with a written notice stating the specific payment terms and duration of the program, that the servicer offered the program based on an evaluation of an incomplete application, that other loss mitigation options may be available, and the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all loss mitigation options available to the borrower regardless of whether the borrower accepts the program or plan. This requirement applies with respect to every such short-term payment forbearance program offered, including each successive program renewal or extension. *See, e.g.*, 78 FR 60381, 60401 (Oct. 1, 2013) (noting that the rule does not preclude a servicer from offering multiple successive short-term payment forbearance programs).

first live contact made pursuant to § 1024.39(a) after August 31, 2021, if the scheduled end date of the forbearance program occurs between August 31, 2021 and September 10, 2021. Additionally, see part VI for discussion of voluntary early compliance.

#### Final Rule

For the reasons discussed in this section and in more detail below, the Bureau is finalizing § 1024.39(e)(2) generally as proposed, with some revisions to address certain comments received. As revised, the Bureau concludes that § 1024.39(e)(2) will help further the Bureau's goal to encourage borrowers to begin application for loss mitigation assistance before the end of the forbearance program.

As discussed above, the Bureau is revising § 1024.39(e)(2) to require that at least 10 and no more than 45 days before the scheduled end date of their current forbearance program, the servicer must provide the borrower a list and brief description of each of the types of forbearance extension, repayment options, and other loss mitigation options made available to the borrower at the time of the live contact, the actions the borrower must take to be evaluated for such loss mitigation options, and at least one way that the borrower can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement. The loss mitigation options listed under § 1024.39(e)(2) are not limited to a specific type of loss mitigation, as servicers must provide borrowers with information about all available loss mitigation types, such as forbearance extensions, repayment plans, loan modifications, short-sales, and others.

As revised, § 1024.39(e)(2) requires this additional information be provided in the live contact established with the borrower at least 10 days and no more than 45 days before the scheduled end of the forbearance program. The Bureau is also revising § 1024.39(e)(2) to address a servicer's obligations with respect to forbearance programs scheduled to end within 10 days after the effective date of this final rule. If the scheduled end date of the forbearance program occurs between August 31, 2021 and September 10, 2021, final § 1024.39(e)(2) requires the servicer to provide the additional information during the first live contact made pursuant to § 1024.39(a) after August 31, 2021.

Finally, the Bureau notes that § 1024.39(e)(2), as revised, works with the new reasonable diligence obligations in comment 41(b)(1)–4.iv to ensure

borrowers that submit incomplete applications receive notification of loss mitigation options that would be available after their COVID-19-related forbearance program ends.

#### *Section 1024.41 Loss Mitigation Procedures*

##### 41(b) Receipt of a Loss Mitigation Application

##### 41(b)(1) Complete 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). It also provides that reasonable diligence means servicers must contact the borrower before the short-term payment forbearance program ends ("the forbearance reasonable diligence contact"), but it does not specify when servicers must make the contact. Consequently, the Bureau proposed adding a new comment, comment 41(b)(1)-4.iv, to specify that, if the borrower is in a short-term payment forbearance program made available to borrowers experiencing a COVID-19-related hardship, servicers must make the forbearance reasonable diligence contact at least 30-days prior to the end of the short-term forbearance program. Additionally, the proposal specified that, if the borrower requests further assistance, the servicer must also exercise reasonable diligence to complete the loss mitigation application prior to the end of forbearance period. The Bureau solicited comment on the proposed 30-day deadline for completing the forbearance reasonable diligence contact at the end of the forbearance and whether a different deadline was appropriate. The Bureau also solicited comment on whether to extend these requirements to all borrowers exiting short-term payment forbearance programs during a specified time period, instead of limiting it to borrowers in a short-term payment forbearance program made available to borrowers experiencing a COVID-19-related hardship.

Overall, commenters generally supported the proposal. A few commenters, including consumer advocate commenters and an industry commenter, suggested a different deadline from the proposed 30-day deadline would be appropriate. The commenters suggested an earlier or later

deadline. Specifically, the consumer advocate commenter indicated they believe the appropriate timing might depend on whether and how the Bureau finalizes proposed § 1024.41(f). Under one scenario, they believed that 30 days was appropriate, but under another scenario they urged the Bureau to move the deadline to resume reasonable diligence to at least 60 days before the end of the forbearance program. The industry commenter encouraged the Bureau to adopt a later deadline, which would allow servicers to complete the forbearance reasonable diligence contact within 30 days before the end of the forbearance. This commenter expressed the belief that borrowers would be more responsive if servicers could complete the forbearance reasonable diligence contact right before the borrower's forbearance ends.

The Bureau declines to revise the proposed 30-day deadline. The 30-day deadline aligns with GSE Quality Right Party Contact (QRPC) guidelines. Servicers are required to establish QRPC at least 30 days before the end of the initial 12-month cumulative COVID-19 forbearance period, or at least 30 days prior to the end of any subsequent forbearance plan term extension.<sup>100</sup> The Bureau aimed to make this requirement complementary to existing GSE guidelines and to avoid exacerbating confusion among servicers attempting to comply with multiple compliance obligations.

The Bureau also received comments from industry commenters on whether the Bureau should extend the reasonable diligence protections of proposed comment 41(b)(1)-4.iv to all borrowers exiting short-term payment forbearance programs during a specified time period or retain the proposed limitation that the comment applies only to borrowers in short-term payment forbearance programs made available to borrowers experiencing a COVID-19-related hardship. These commenters encouraged the Bureau to retain the proposed limitation. Commenters noted that the proposed comment's requirements mirror current practices and would not create an extra burden for servicers to implement. The commenters cautioned against imposing any additional reasonable diligence requirements, citing that many servicers are fatigued from constant policy

changes. The Bureau did not receive any comments suggesting that the proposed provision should apply to all borrowers exiting short-term payment forbearance programs. The Bureau is finalizing the applicability of comment 41(b)(1)-4.iv as proposed.

A few commenters, including industry commenters encouraged the Bureau to exclude servicers from the requirement to make the proposed forbearance reasonable diligence contact if the borrower voluntarily ends forbearance. To clarify that the reasonable diligence requirements included in new comment 41(b)(1)-4.iv mirror the scope of existing comment 41(b)(1)-4.iii and only apply if the borrower remains delinquent, the Bureau is adding the phrase "if the borrower remains delinquent" to proposed comment 41(b)(1)-4.iv. This language is in comment 41(b)(1)-4.iii but was inadvertently omitted from proposed comment 41(b)(1)-4.iv. The Bureau declines to exclude servicers from the forbearance reasonable diligence contact if the borrower voluntarily ends forbearance early. If a borrower voluntarily ends forbearance early and remains delinquent, the servicer must still make the forbearance reasonable diligence contact required by comment 41(b)(1)-4.iv. If a borrower voluntarily ends forbearance early and is no longer delinquent, servicers need not make the forbearance reasonable diligence contact.

Some industry commenters also urged the Bureau to eliminate the proposed requirement to exercise reasonable diligence to complete an application, stating that § 1024.41(c)(2)(v), adopted in the June 2020 IFR,<sup>101</sup> and proposed § 1024.41(c)(2)(vi) permit servicers to offer certain loss mitigation options based on the evaluation of an incomplete application. Commenters indicated that they believe borrowers will be confused if servicers contact borrowers to evaluate them for a payment deferral or loan modification based on an incomplete application, but then also contact them to inquire if they want to complete a loss mitigation application. The Bureau holds that while § 1024.41(c)(2)(v) and new § 1024.41(c)(2)(vi) empower servicers to offer deferral or loan modifications based on the evaluation of an incomplete application, a servicer is still required to exercise reasonable diligence to complete an application unless the borrower accepts the deferral or loan modification offer. There are benefits to borrowers of being fully evaluated for all available loss

<sup>100</sup> The Fed. Nat'l Mortg. Ass'n, *Lender Letter (LL-2021-02)*, at 6 (Feb. 25, 2021), <https://singlefamily.fanniemae.com/media/24891/display>; The Fed. Home Loan Mortg. Corp., *COVID-19 Servicing: Guidance for Helping Impacted Borrowers*, at 5 (May 1, 2021), <https://sf.freddiemac.com/content/assets/resources/pdf/ebooks/helpstartshere-servicing-ebook.pdf>.

<sup>101</sup> 85 FR 39055 (June 30, 2020).

mitigation options based on complete application, and certain protections under the rules apply only once the borrower completes an application. In addition, if a servicer believes that a borrower may be confused by the reasonable diligence outreach, a servicer may provide additional information to the borrower to help explain the application process. The Bureau encourages this type of transparency in communications. However, once the borrower accepts a deferral offer or loan modification offer based on that evaluation of an incomplete application, the servicer is not required to continue to exercise reasonable diligence to complete any loss mitigation application that the borrower submitted before the servicer's offer of the accepted loss mitigation option.

A few commenters requested that the Bureau clarify the method of compliance for the outreach requirements in comment 41(b)(1)–4. Specifically, an industry commenter requested that the Bureau clarify whether the outreach requirements could be satisfied either orally or in writing. A consumer advocate commenter requested that the Bureau clarify that the outreach must be sent in writing. The Bureau clarifies that the forbearance reasonable diligence contact required by comment 41(b)(1)–4.iv, like the forbearance reasonable diligence contact required by comment 41(b)(1)–4.iii can be oral or in writing. Servicers will likely find it beneficial to communicate their decisions in writing in some cases to prevent ambiguity and memorialize decisions. However, there may be circumstances where oral notification is advantageous due to time constraints, and the Bureau has concluded that the best approach is to allow the servicer to choose the appropriate mode of communication based on the particular facts and circumstances of each case.

For the reasons discussed above, the Bureau is finalizing comment 41(b)(1)–4.iv as proposed with a minor edit to clarify the provision applies only to delinquent borrowers. As finalized, comment 41(b)(1)–4.iv explains that 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 if the borrower remains delinquent and 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.

#### 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 proposed 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 also proposed to amend 1024.41(c)(2)(i) to reference the new proposed exception in § 1024.41(c)(2)(vi). The Bureau did not receive any comments on the addition of this reference and, because the Bureau is adopting § 1024.41(c)(2)(vi), the Bureau is finalizing the amendment to § 1024.41(c)(2)(i) as proposed.

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

*Definition of a COVID–19-related hardship.* 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 § 1024.31, the Bureau

proposed 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 proposed a conforming amendment to § 1024.41(c)(2)(v) to utilize the proposed new term.

As further explained in the section-by-section analysis of § 1024.31, the Bureau is revising the proposed definition of the term “COVID–19-related hardship” for purposes of subpart C to refer in the final rule to the national emergency proclamation related to COVID–19, rather than to the COVID–19 emergency as defined in section 4022 of the CARES Act. The Bureau did not receive any comments on the conforming amendment in § 1024.41(c)(2)(v), and is finalizing it as proposed. The Bureau does not intend for this conforming amendment to substantively change § 1024.41(c)(2)(v).

*Escrow Issues.* As the Bureau stated in the June 2020 IFR,

§ 1024.41(c)(2)(v)(A)(1) allows for some flexibility among loss mitigation options that may qualify for the exception. For example, although the loss mitigation options must defer all forbore or delinquent principal and interest payments under § 1024.41(c)(2)(v)(A)(1), the rule does not specify how servicers must treat any forbore or delinquent escrow amounts. A loss mitigation option would qualify for the exception if it defers repayment of escrow amounts, in addition to principal and interest payments, as long as it otherwise satisfies § 1024.41(c)(2)(v)(A).

The Bureau has received questions about whether servicers should issue a short-year annual escrow account statement under § 1024.17(i)(4) prior to offering a loss mitigation option under § 1024.41(c)(2)(v)(A). Regulation X does not require a short year statement prior to offering any loss mitigation option, but the Bureau strongly encourages servicers to conduct an escrow analysis and issue a short-year statement or annual statement, depending on the applicable timing. Doing so may help avoid unexpected potential escrow-related payment increases after the borrower has already agreed to a loss mitigation option, and can inform servicers of the information needed to provide a history of the escrow account, pursuant to § 1024.17(i)(2), after the loan becomes current.

The Bureau has also received questions about how servicers may treat funds that they have advanced or plan to advance to cover escrow shortages in

this context. Assume a servicer performs an escrow analysis before offering a loss mitigation option to the borrower under § 1024.41(c)(2)(v)(A), and the analysis reveals a shortage. The Bureau has received questions about whether the servicer is permitted under Regulation X to advance funds to cover the shortage (for example, if a borrower is in a forbearance) and seek repayment of those advanced funds as part of the non-interest bearing deferred balance that is due when 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 FHA, the mortgage insurance terminates. Section 1024.17 has specific rules and procedures for the administration of escrow accounts associated with federally related mortgage loans, but it does not address the specific situation described in the question. Regulation X does not prohibit a servicer from seeking repayment of funds advanced to cover the shortage as described above. Section 1024.17 is intended to ensure that servicers do not require borrowers to deposit excessive amounts in an escrow account (generally limiting monthly payments to 1/12th of the amount of the total anticipated disbursements, plus a cushion not to exceed 1/6th of those total anticipated disbursements, during the upcoming year). Loss mitigation programs such as those permitted under § 1024.41(c)(2)(v)(A) give the borrower more time to repay forborne or delinquent amounts and does not specify how servicers must treat any forborne or delinquent escrow amounts. Regulation X does not prohibit the borrower and servicer from agreeing to a loss mitigation option that allows for the repayment of funds that a servicer has advanced or will advance to cover an escrow shortage.<sup>102</sup>

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

##### The Bureau's Proposal

As discussed in more detail in the section-by-section analysis of § 1024.41(c)(2)(i), 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

<sup>102</sup> Additionally, when a borrower is more than 30 days delinquent, a servicer may recover a deficiency in the borrower's escrow account pursuant to the terms of the mortgage loan documents. Deficiencies exist when there is a negative balance in the borrower's escrow account, which can occur, for example, when a servicer advances funds for expenses such as taxes and insurance. See § 1024.17(f)(4)(iii).

incomplete application. The Bureau proposed to add a new temporary exception to this anti-evasion requirement to permit servicers to offer certain loan modification options made available to borrowers with COVID-19-related hardships based on the evaluation of an incomplete application. The exception is temporary because the Bureau in this final rule is defining the term "COVID-19-related hardship" for purposes of subpart C to refer to a financial hardship due, directly or indirectly, to the national emergency for the COVID-19 pandemic declared in Proclamation 9994 on March 13, 2020 (beginning on March 1, 2020) and continued on February 24, 2021. At some point after the national emergency ends, servicers will no longer make available loan modification options to borrowers with COVID-19-related hardships for purposes of subpart C.

The proposal would have established eligibility criteria for the new exception in proposed § 1024.41(c)(2)(vi)(A). Specifically, a loan modification eligible for the proposed new exception would have to 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 and charges. For loan modifications to qualify under the proposed new exception, they would not be able to charge interest on amounts that the borrower may delay paying until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures. However, loan modifications that charge interest on amounts that are capitalized into a new modified term would qualify for the proposed new exception, as long as they otherwise satisfy all of the criteria in § 1024.41(c)(2)(vi)(A). To qualify for the proposed new exception, a loan modification also either (1) would have to cause any preexisting delinquency to end upon the borrower's acceptance of the offer or (2) 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.

Once the borrower accepts an offer made pursuant to proposed § 1024.41(c)(2)(vi)(A), the Bureau proposed to exclude servicers from the requirement to exercise reasonable diligence required by § 1024.41(b)(1) and to send the acknowledgement notice required by § 1024.41(b)(1). However, the proposal would have required the servicer to immediately resume reasonable diligence efforts

required by § 1024.41(b)(1) if the borrower fails to perform under a trial loan modification plan offered pursuant to the proposed new exception or requests further assistance.

The Bureau solicited comment on the proposed new exception. For the reasons discussed below, the Bureau is finalizing proposed § 1024.41(c)(2)(vi) largely as proposed, with some revisions to address certain comments received, including limiting the requirement to waive certain fees, as discussed in more detail below.

##### Comments Received

*General comments about the proposed exception.* The vast majority of commenters, including industry, consumer advocate commenters, and individuals, expressed general support for proposed § 1024.41(c)(2)(vi). Most commenters who expressed support for proposed § 1024.41(c)(2)(vi) also urged the Bureau to make certain revisions to the provision. In general, industry commenters requested that the Bureau provide additional flexibility, clarification, or both surrounding what loan modification options can qualify for the new anti-evasion exception and the regulatory relief provided to servicers after they offer these loan modifications. Consumer advocate commenters generally requested that the final rule require that servicers provide various additional disclosures and protections to borrowers who are evaluated for a loan modification option based on the evaluation of an incomplete application. The Bureau's responses to these comments are discussed further in this section and the section-by-section analyses below.

A few individuals and a few industry commenters expressed opposition to the proposed new exception overall for a variety of reasons and suggested removing it entirely or replacing it with various alternatives. The Bureau concludes that it is 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").<sup>103</sup> These programs will

<sup>103</sup> A loan modification that a servicer offers based upon the evaluation of an incomplete loss mitigation application can qualify for the exception in § 1024.41(c)(2)(vi) even if the servicer collects information, such as information to verify income, from a borrower. Section 1024.41(b)(1) defines a complete loss mitigation application as an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications

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.

*Additional disclosures and protections.* Some consumer advocate commenters urged the Bureau to provide additional disclosures and protections in connection with the evaluation of a streamlined loan modification option under proposed § 1024.41(c)(2)(vi). A few of these commenters urged the Bureau to include additional requirements for eligible loan modifications, including, for example, requiring certain written notices, denial notices, the right to appeal a decision, dual tracking protections, and simultaneous evaluation for all available streamlined loan modification options. One of these commenters also urged the Bureau to prohibit a servicer from requiring a borrower to give up the option of obtaining a streamlined loan modification if the borrower completes a loss mitigation application. This commenter expressed concern that borrowers would be negatively affected by not knowing the options for which they had been reviewed if, for example, they had been denied for an option on the basis of inaccurate information. A group of State Attorneys General also commented generally that a borrower

for the loss mitigation options available to the borrower. If a servicer collects a complete loss mitigation application, the servicer is required to comply with all of the provisions of § 1024.41 relating to the receipt of complete loss mitigation applications, such as a written notice of determination, the right to an appeal, and dual tracking protections. If a servicer collects information that does not constitute a complete loss mitigation application, the servicer is prohibited from making an offer for a loss mitigation option by § 1024.41(c)(2)(ii), unless one of the exceptions listed in § 1024.41(c)(2)(ii) through (vi) applies.

should be aware of all loss mitigation options available to them.

One of the consumer advocate commenters urged the Bureau to require that a servicer include streamlined options during a review of a complete loss mitigation option that may take place after a borrower is offered a loan modification under the exception, and expressed skepticism that servicers would complete another loan modification quickly after implementing a loan modification offered under the exception. The same commenter expressed concern that defaults or trial loan modification plan failures for loan modification options offered under the exception would render a borrower ineligible to receive another streamlined loan modification for a period of time.

The Bureau acknowledges that borrowers accepting a loan modification offer under the new exception will not receive protections under § 1024.41 that are critical in other circumstances. However, the Bureau concludes that the exception set forth in final § 1024.41(c)(2)(vi)(A) will be unlikely to affect this benefit in most cases, given the narrow scope and particular circumstances of the exception. If a borrower is interested in another form of loss mitigation after accepting an offer made pursuant to § 1024.41(c)(2)(vi)(A), they would still have the right under § 1024.41 to submit a complete loss mitigation application and receive an evaluation for all available options. This would be the case even if, for example, a borrower accepted a loan modification trial plan offered pursuant to § 1024.41(c)(2)(vi)(A) and then failed to perform on that plan.

Further, to be eligible for the exception under § 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 § 1024.41(c)(2)(vi)(A) or requests further

assistance, under § 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). Also, as further discussed below, in this final rule the Bureau is amending § 1024.41(c)(2)(vi)(B) to adopt as final a requirement that if a borrower fails to perform under a trial loan modification plan offered pursuant to § 1024.41(c)(2)(vi)(A) or requests further assistance, the servicer must send the borrower the notice required by § 1024.41(b)(2)(i)(B), with regard to the most recent loss mitigation application the borrower submitted prior to the servicer's offer of the loan modification under the exception, unless the servicer has already sent that notice to the borrower.

Finally, as discussed in the section-by-section analysis of § 1024.41(f)(3), the Bureau is finalizing requirements for special COVID-19 loss mitigation procedural safeguards that will extend through December 31, 2021. These requirements provide generally that a servicer must ensure that certain procedural safeguards are met to give borrowers a meaningful opportunity to pursue loss mitigation options before a servicer initiates foreclosure. These special COVID-19 loss mitigation procedural safeguards will temporarily provide borrowers with more time to submit a complete loss mitigation application, should they choose to do so, before they would be at risk of referral to foreclosure.

With respect to some commenters' concerns that consumers should be made aware of the loss mitigation options available to them, many borrowers who would receive an offer pursuant to § 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 general, borrowers who previously entered into a forbearance program will also have received the notice required under § 1024.41(b)(2) and written notification of the terms and conditions of the forbearance program stating, among other things, 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.

As noted above, a commenter expressed concern that a borrower default on a loan modification or failure to perform under a trial loan modification plan may render a borrower ineligible for certain additional loan modifications for a period of time. The Bureau notes that the flex modification guidelines cited by the commenter in discussing this concern are Fannie Mae's general flex modification guidelines. Fannie Mae's reduced eligibility guidelines apply to COVID-19-related hardships, and the reduced eligibility guidelines do not contain the limitation cited by the commenter related to previous failure to perform on a trial loan modification or previous default on a flex modification.<sup>104</sup> The Bureau therefore understands that a borrower experiencing a COVID-19-related hardship who previously failed to perform on a trial loan modification or defaulted on a permanent loan modification would not be precluded from obtaining another flex modification for those reasons.

For the reasons discussed above, the Bureau declines to generally extend the requirements in § 1024.41 relating to the receipt of complete loss mitigation applications, such as a written notice of determination, the right to an appeal, and dual tracking protections, to borrowers who are evaluated for or offered a streamlined loan modification on the basis of an incomplete application. The Bureau also declines to impose requirements on servicers regarding which and how many streamlined loan modifications it must evaluate a borrower for on the basis of an incomplete application or on the basis of a complete loss mitigation application that the borrower may elect to submit after the servicer has evaluated an incomplete loss mitigation application under § 1024.41(c)(2)(vi).

*Expanded eligibility criteria.* Some industry commenters asked that the Bureau expand the eligibility criteria in § 1024.41(c)(2)(vi)(A) to cover a much broader variety of loss mitigation options available to borrowers with COVID-19-related hardships, including, among other things, repayment plans and loan modifications that would increase the monthly required principal and interest payment. Another industry

commenter urged the Bureau to apply the anti-evasion exception to bankruptcy plans that are amended to cure COVID-19 delinquencies.

The Bureau declines to generally broaden the exception's eligibility requirements to cover more loss mitigation solutions with criteria different from those outlined in § 1024.41(c)(2)(vi)(1)–(5), as requested by some commenters, for reasons discussed in the section-by-section analyses of those sections below.

#### Final Rule

For the reasons discussed herein, the Bureau is adopting § 1024.41(c)(2)(vi) largely as proposed, with a few changes described below.

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

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

#### The Bureau's Proposal

Under proposed § 1024.41(c)(2)(vi)(A)(1), the first criteria would have been 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. As discussed more fully below, the Bureau is adopting the criteria in § 1024.41(c)(2)(vi)(A)(1) as proposed, with minor clarifying changes as discussed below.

#### Comments Received

One consumer advocate commenter and one individual commenter expressed specific support for the 480-month term limitation criterion. Some individual commenters expressed opposition to the 480-month term limitation criterion, stating generally that a 480-month term was too long.

One consumer advocate commenter expressed support for the payment increase limitation. One consumer advocate commenter and a few industry commenters urged the Bureau to provide additional flexibility for a streamlined loan modification to qualify for the new exception even if it resulted in increases to the monthly required principal and interest payment amount. The consumer advocate commenter advocated for a percentage cap, such as 15 percent or 20 percent, on any potential increase, noting that capitalizing a large amount of forbore payments may make it hard to achieve payment reduction. The Bureau also received feedback during its interagency consultation process indicating that limiting the proposed new exception to loan modifications that do not increase a borrower's monthly required principal

and interest payment would exclude from the exception some loan modifications offered under FHA's COVID-19 owner-occupant loan modification program, which permits payment increases in certain circumstances. The industry commenters noted that some investors do not offer loan modifications with long-term fixed rates, and urged the Bureau to clarify whether the criterion as proposed would allow adjustable rate loan modifications to qualify for the new anti-evasion exception.

A different industry commenter stated that certain State laws prohibit balloon payments, which could make it difficult for servicers to offer loan modifications that do not extend the term beyond 480 months or cause the monthly required principal and interest to increase, because the servicer could not defer remaining delinquent amounts to the end of the loan.

#### Final Rule

For the reasons discussed below, the Bureau is adopting § 1024.41(c)(2)(vi)(A)(1) as proposed, with minor revisions to clarify the criterion that, for a loan modification to qualify for the exception, the monthly required principal and interest payment amount must not increase for the entire modified term.

The Bureau believes that it will be advantageous to borrowers and servicers alike to facilitate the timely transition of eligible borrowers into certain streamlined loan modifications that do not cause additional financial hardship, such as flex modifications offered by the GSEs and COVID-19 owner-occupant loan modifications offered by FHA that meet the eligibility criteria in § 1024.41(c)(2)(vi)(A)(1)–(5).<sup>105</sup> The Bureau has concluded that the criteria discussed in this section-by-section analysis relating to the term and payment features of loan modifications eligible for the exception are appropriate to achieve this goal.

The Bureau notes that § 1024.41(c)(2)(vi) itself will not prevent borrowers from qualifying for certain loss mitigation options. The criteria that the Bureau is adopting in final § 1024.41(c)(2)(vi)(A) do not constitute general requirements or prohibitions applying to all loss mitigation options. Rather, they are a narrowly tailored exception to the anti-evasion requirement to allow servicers to offer certain loan modifications to borrowers

<sup>104</sup> See 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>105</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> (HUD Mortgagee Letter).



on the basis of an incomplete application. Section 1024.41(c)(2)(vi) does not prevent a borrower from submitting a complete loss mitigation application, and it does not relieve servicers of their obligations under § 1024.41 to evaluate a borrower for all available loss mitigation options upon the receipt of a complete loss mitigation application. Borrowers can therefore still be evaluated for all loss mitigation options available to them, including options that increase the term of the loan beyond 480 months from the effective date of the loan modification and options that entail an increase to the required monthly principal and interest payment amount, by submitting a complete loss mitigation application.

In response to some commenters' requests for clarification regarding whether a loan modification with an adjustable rate can qualify for the exception, the Bureau is adopting revised language in final § 1024.41(c)(2)(vi)(A)(1) clarifying that, for the entire modified term, the monthly required principal and interest payment cannot increase beyond the monthly principal and interest payment required prior to the loan modification. Other than this clarifying language, the Bureau adopts § 1024.41(c)(2)(vi)(A)(1) as proposed.

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

#### The Bureau's Proposal

Under proposed § 1024.41(c)(2)(vi)(A)(2), to qualify for the anti-evasion requirement exception, 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. As proposed, § 1024.41(c)(2)(vi)(A)(2) also would have provided that, to qualify for the anti-evasion 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. For ease of readability, the Bureau is moving the language regarding fees to new final § 1024.41(c)(2)(vi)(A)(5). These criteria, as well as a revision to them that the Bureau is adopting in this final rule, are therefore discussed in additional detail in the section-by-section analysis of § 1024.41(c)(2)(vi)(A)(5).

#### Comments Received

The Bureau received a few comments on this proposed provision. One consumer advocate commenter noted

that the Bureau did not include FHA mortgage insurance termination as a point after which amounts that a borrower may delay paying must not accrue interest to meet the proposed criterion, even though this language is included in the exception for certain deferrals described in § 1024.41(c)(2)(v). An industry commenter and a consumer advocate commenter asked that the Bureau clarify whether a loan modification that capitalizes some arrearages, such as interest arrearages, escrow advances, and escrow shortages, into the principal balance of a loan modification would satisfy the criterion in proposed § 1024.41(c)(2)(vi)(A)(2). Because the GSEs also specify that, for flex modifications, amounts that the borrower may delay paying until the mortgage loan is transferred or the unpaid principal balance (UPB) is paid off must not accrue interest, the Bureau sought comment on whether to specify in a final rule that interest cannot be charged on amounts that a borrower may delay paying until UPB pay off, transfer, or both. The Bureau did not receive any comments regarding the potential addition of this language.

#### Final Rule

The Bureau is adopting the criterion in § 1024.41(c)(2)(vi)(A)(2) largely as proposed with a revision to add language addressing FHA mortgage insurance termination. This eligibility criterion ensures that borrowers receiving one of the covered loan modifications will have years to plan to address amounts that are not due until the mortgage loan is refinanced, the mortgaged property is sold, the loan modification matures, or, for a mortgage loan insured by FHA, the mortgage insurance terminates, and that those amounts will not increase due to interest accrual. This may be particularly important during the COVID-19 emergency, as many borrowers may be facing extended periods of economic uncertainty.

With respect to the addition in this final rule of language addressing FHA mortgage insurance termination, the Bureau notes that FHA's COVID-19 owner-occupant loan modification does not involve allowing a borrower to delay paying certain amounts until FHA mortgage insurance terminates. However, the Bureau understands that FHA also offers a COVID-19 combination partial claim and loan modification, which includes the potential extension of the loan's term, as well as allowing a borrower to delay paying certain amounts until FHA

mortgage insurance terminates.<sup>106</sup> If this type of loan modification option meets all of the criteria listed in § 1024.41(c)(2)(vi)(A), servicers can offer it under that anti-evasion exception on the basis of an incomplete application. The Bureau is therefore adopting § 1024.41(c)(2)(vi)(A)(2) with the addition of language concerning FHA mortgage insurance termination, to clarify that a loan modification option can qualify for § 1024.41(c)(2)(vi)'s exception if, in addition to meeting § 1024.41(c)(2)(vi)(A)'s other eligibility requirements, amounts the borrower may delay paying until FHA mortgage insurance terminates do not accrue interest.

In response to commenters' request for clarification regarding capitalization of amounts into a new modified loan term, the Bureau notes that loan modifications that charge interest on amounts that are capitalized into a new modified term would qualify for the proposed new exception, as long as they otherwise satisfy all of the criteria in § 1024.41(c)(2)(vi)(A). Capitalized amounts are amounts that the borrower pays over the course of the new modified term, and a loan modification can meet the criteria in § 1024.41(c)(2)(vi)(A) even if these amounts accrue interest. However, if the loan modification permits the borrower to delay paying certain amounts until the mortgage loan is refinanced, the mortgaged property is sold, the loan modification matures, or, for a mortgage loan insured by FHA, the mortgage insurance terminates, the criterion in final § 1024.41(c)(2)(vi)(A)(2) are met only if those amounts do not accrue interest. The Bureau is revising § 1024.41(c)(2)(vi)(A)(2) to make more clear that this criterion regarding interest accrual only applies to loan modifications that involve payments that are delayed until the mortgage loan is refinanced, the mortgaged property is sold, the loan modification matures, or, for a mortgage loan insured by FHA, the mortgage insurance terminates.

With respect to concerns regarding the potential capitalization of amounts related to escrow, the Bureau has received questions about whether the servicer is permitted under Regulation X to advance funds to cover an escrow shortage (for example, if a borrower is in a forbearance) and seek repayment of those advanced funds by capitalizing them into a modified principal balance as part of a loan modification. Section 1024.17 has specific rules and procedures for the administration of escrow accounts associated with

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

federally related mortgage loans, but it does not address the specific situation described in the question. Regulation X does not prohibit a servicer from seeking repayment of funds advanced to cover the shortage as described above. Section 1024.17 is intended to ensure that servicers do not require borrowers deposit excessive amounts in an escrow account (generally limiting monthly payments to 1/12th of the amount of the total anticipated disbursements, plus a cushion not to exceed 1/6th of those total anticipated disbursements, during the upcoming year). Loss mitigation programs such as those permitted under this final rule give the borrower more time to repay forborne or delinquent amounts and do not specify how servicers must treat any forborne or delinquent escrow amounts. Regulation X does not prohibit the borrower and servicer from agreeing to a loss mitigation option that allows for the repayment of funds that a servicer has advanced or will advance to cover an escrow shortage.<sup>107</sup>

As described above, the Bureau is adopting § 1024.41(c)(2)(vi)(A)(2) as proposed, with revisions to add language concerning FHA mortgage termination and to clarify that permitting a delay in the payment of amounts until the mortgage loan is refinanced, the mortgaged property is sold, the loan modification matures, or, for a mortgage loan insured by FHA, the mortgage insurance terminates is not required for a loan modification to qualify for the anti-evasion exception in § 1024.41(c)(2)(vi)(A).

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

#### The Bureau's Proposal

Proposed § 1024.41(c)(2)(vi)(A)(3) would have required that, to qualify for the anti-evasion requirement exception, the loan modification offered pursuant to the exception in § 1024.41(c)(2)(vi)(A) must have been made available to borrowers experiencing a COVID-19-related hardship. As discussed in the section-by-section analysis of § 1024.31, the Bureau proposed 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))." The Bureau solicited comment on whether to instead condition eligibility on loan modifications offered during a specified time period, regardless of whether the option was made available to borrowers with a COVID-19-related hardship. The

Bureau sought comment on whether that alternative would be easier for servicers to implement.

#### Comments Received

The Bureau received a few comments on this aspect of the proposal. An individual commenter expressed concern that servicers may require evidence of the onset of the hardship. A consumer advocate commenter noted it would have no general objection to an approach limiting the exception to a time period, indicating that that approach might be easier for servicers to administer. For the reasons discussed below, the Bureau is adopting § 1024.41(c)(2)(vi)(A)(3) as proposed.

#### Final Rule

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 believes it would be difficult to establish with certainty a date beyond which borrowers would no longer be experiencing COVID-19-related hardships and servicers may stop making loan modification options available to borrowers experiencing such hardships. As further explained in the section-by-section analysis of § 1024.31, the Bureau is revising the proposed definition of the term "COVID-19-related hardship" for purposes of subpart C to refer in this final rule to the national emergency proclamation related to COVID-19. No end date for this national emergency has been announced. The Bureau therefore concludes that it is appropriate to limit eligibility for the exception in § 1024.41(c)(2)(vi) to loan modification options that are generally made available to borrowers experiencing a COVID-19-related hardship.

Regarding a commenter's concern that servicers would require evidence of a COVID-19-related hardship, the Bureau notes that the final rule does not require as a criterion for the anti-evasion exception that the individual borrower offered the loan modification has experienced a COVID-19-related hardship. Rather, the final rule limits this exception to loan modifications made available to borrowers experiencing a COVID-19-related hardship. The loan modification option offered need not be made available exclusively to borrowers experiencing a COVID-19-related hardship to qualify for the anti-evasion exception. A loan modification option can qualify for the

anti-evasion exception if it is made available to borrowers experiencing a COVID-19-related hardship as well as other borrowers. For example, the Bureau understands that the GSEs' flex modifications are offered to a broader population of borrowers than those experiencing COVID-19-related hardships.<sup>108</sup> Because these loan modifications are currently also available to borrowers experiencing COVID-19-related hardships, they meet the criterion that the Bureau is adopting as final in § 1024.41(c)(2)(vi)(A)(3).

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

#### The Bureau's Proposal

Proposed § 1024.41(c)(2)(vi)(A)(4) would have required that either the borrower's acceptance of a loan modification offer end any preexisting delinquency on the mortgage loan, or that a loan modification offered 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).

#### Comments Received

The Bureau did not receive any comments specifically addressing proposed § 1024.41(c)(2)(vi)(A)(4). For the reasons discussed below, the Bureau is adopting this requirement as proposed.

#### Final Rule

The Bureau believes that this provision will help ensure that borrowers who accept a loan modification offered under § 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>109</sup> If the borrower's acceptance of a loan

<sup>108</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>109</sup> 12 CFR 1024.41(f)(1).

<sup>107</sup> *Supra* note 102.

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 § 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 anti-evasion 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 pursuant to § 1024.41(c)(2)(vi)(A). This requirement would apply, for example, for a borrower who accepted a trial loan modification plan offered pursuant to § 1024.41(c)(2)(vi)(A) and subsequently fails to perform under that plan.

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 § 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 § 1024.41(c)(2)(vi)(A) is finalized.<sup>110</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. For these reasons, the Bureau is adopting § 1024.41(c)(2)(vi)(A)(4) as proposed.

#### 41(c)(2)(vi)(A)(5)

#### The Bureau's Proposal

As noted above, proposed § 1024.41(c)(2)(vi)(A)(2) would have provided that, to qualify for the anti-evasion requirement exception in § 1024.41(c)(2)(vi)(A), 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. For ease of readability, the Bureau is moving this provision to new final § 1024.41(c)(2)(vi)(A)(5). The Bureau invited comment on whether the proposed fee waiver criterion was 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. The Bureau is revising this provision to add a date limitation of March 1, 2020, on the fee waiver criterion, as described below.

#### Comments Received

The Bureau received several comments on this aspect of the proposal. Some industry commenters urged the Bureau to narrow the fee waiver criterion to fees incurred during a COVID-19-related forbearance or on or after March 1, 2020. One consumer advocate commenter also asked the Bureau to limit the fee waiver criterion to only fees incurred after March 1, 2020, noting that this criterion would align with FHA rules regarding COVID-19 loan modification fee waivers. The Bureau also received feedback regarding FHA fee waivers during its interagency consultation process encouraging the Bureau to narrow the fee waiver criterion to fees incurred on or after March 1, 2020. Some industry commenters asked that the Bureau confirm whether pass-through costs, such as inspection fees, are subject to the waiver requirement. The Bureau did not receive any comments addressing

the aspect of the criterion excluding a loan modification option from eligibility for the exception if a fee is charged in connection with the loan modification option.

#### Final Rule

The Bureau is adopting § 1024.41(c)(2)(vi)(A)(2) largely as proposed, but re-numbered as § 1024.41(c)(2)(vi)(A)(5) and with a revision limiting the requirement to waive certain fees as discussed below. The final rule provides that, to qualify for the anti-evasion exception, a servicer must waive all existing late charges, penalties, stop payment fees, or similar charges that were incurred on or after March 1, 2020, promptly upon the borrower's acceptance of the loan modification. This revision responds to commenters' concerns that the proposed fee waiver criterion would inappropriately limit the availability of the exception. The Bureau, in adopting the new anti-evasion exception, seeks to allow servicers to offer loan modifications to borrowers on the basis of an incomplete application if such a loan modification would avoid imposing additional economic hardship on borrowers who likely have already experienced prolonged economic hardship due to the COVID-19 pandemic.

The Bureau believes that servicers may be more likely to expeditiously offer the types of loan modifications that may qualify for the exception in § 1024.41(c)(2)(vi) if they are not required to waive fees and charges incurred before March 1, 2020. This approach also aligns with FHA servicer guidelines, which only require servicers to waive fees incurred on or after March 1, 2020, for its COVID-19 owner-occupant loan modification and its combination partial claim and loan modification.<sup>111</sup> The Bureau declines to tie the fee waiver criterion to fees incurred during forbearance, because some borrowers seeking a streamlined loan modification may not have been in forbearance for some or all of the period between March 1, 2020 and the point at which the servicer offers an eligible loan modification to the borrower.

The Bureau does not believe that it is necessary to revise the proposed regulatory language to address commenters' requests to clarify what is meant by similar charges for purposes of this criterion. As finalized, § 1024.41(c)(2)(vi)(A)(5) states that the servicer must waive all existing late charges, penalties, stop payment fees, or

<sup>110</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>111</sup> HUD Mortgagee Letter, *supra* note 105, at 9 and 11.

similar charges. Similar charges for purposes of § 1024.41(c)(2)(vi)(A)(5) refers to charges that are similar to late charges, penalties, and stop payment fees. The Bureau understands that late charges, penalties, and stop payment fees are typically amounts imposed on a borrower's mortgage loan account directly by the servicer. By contrast, costs such as inspection fees are typically paid by the servicer to a third party, and are therefore not similar to late charges, penalties and stop payment fees. These charges do not need to be waived for a loan modification to qualify under § 1024.41(c)(2)(vi)(A)'s anti-evasion exception.

For the reasons described above, the Bureau is adopting § 1024.41(c)(2)(vi)(A)(5), renumbered from the proposal and with the revisions discussed above.

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

#### The Bureau's Proposal

Section 1024.41(b)(1) requires that a servicer exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application, and § 1024.41(b)(2) requires that promptly upon receipt of a loss mitigation application, a servicer must review the application to determine if it is complete, and send the written notice described in § 1024.41(b)(2)(i)(B) in connection with such an application within five days after receiving the application, acknowledging receipt of the application ("acknowledgement notice"). As proposed, § 1024.41(c)(2)(vi)(B) would have offered servicers relief from these regulatory requirements when a borrower accepts a loan modification meeting the criteria that the Bureau proposed in § 1024.41(c)(2)(vi)(A), but it would have required 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 failed to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A) or if the borrower requested further assistance.

The Bureau solicited comment on whether the Bureau should adopt additional foreclosure referral protections for borrowers enrolled in a trial loan modification program that does not end any prior delinquency upon the borrower's acceptance of the offer, 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 proposed § 1024.41(f)(3). For the reasons discussed below, the Bureau is adopting § 1024.41(c)(2)(vi)(B) as proposed, with the revisions discussed below.

#### Comments Received

*Timing of regulatory relief and resumption of reasonable diligence.* The Bureau received several comments addressing proposed § 1024.41(c)(2)(vi)(B). As discussed above, proposed § 1024.41(c)(2)(vi)(B) would have provided servicers with relief from the regulatory requirements to perform reasonable diligence to complete a loss mitigation application and to send an acknowledgement notice when a borrower accepts a loan modification meeting the criteria that the Bureau proposed in § 1024.41(c)(2)(vi)(A). Some industry commenters urged the Bureau to provide relief from these regulatory requirements starting from the point that the servicer offers the loss mitigation option until the borrower rejects the offer, rather than providing such relief only if and when the borrower accepts the offer. The industry commenters noted that, as proposed, the rule would in some circumstances still require the servicer to send the notice required by § 1024.41(b)(2)(i)(B), which the commenters implied could confuse borrowers who were still considering an outstanding offer of a streamlined loan modification. Additionally, an industry commenter stated that the provision as proposed may create confusion about how a servicer must confirm the borrower's acceptance of the offer.

An industry commenter urged the Bureau not to require the resumption of reasonable diligence efforts under § 1024.41(b)(1) when a borrower fails to perform under a trial loan modification plan offered pursuant to proposed § 1024.41(c)(2)(vi)(A). This commenter expressed concern that borrowers who fail to perform under a trial loan modification plan are unlikely to be able to afford a home retention option and stated that the requirement that servicers resume reasonable diligence to complete a loss mitigation application for those borrowers would thus impose undue burden on servicers. The same commenter urged the Bureau to clarify that servicers are permitted to continue to collect a complete loss mitigation application while a borrower is in a trial loan modification plan that was offered pursuant to § 1024.41(c)(2)(vi)(A).

The Bureau is finalizing § 1024.41(b)(2)(i)(B) to provide servicers with relief from the requirements of § 1024.41(b)(1) and (b)(2) upon the

borrower's acceptance of an offer made pursuant to § 1024.41(c)(2)(vi)(A). In response to a commenter's concern about the method of a borrower's acceptance of an offer, the Bureau stresses that § 1024.41(c)(2)(vi) does not impose any specific requirements on servicers concerning what constitutes a borrower's acceptance of loan modification offer. For example, the Bureau acknowledges that acceptance can take place verbally, and does not necessarily need to occur in writing. As to the concern about notices sent pursuant to § 1024.41(b)(2)(i)(B), the Bureau notes that § 1024.41(b)(2)(i)(B) does not prohibit a servicer from adding explanatory language to such a notice to allay potential confusion if a loan modification offer is outstanding when the notice is sent. The Bureau encourages this type of transparency in communications.

The Bureau also believes that it is important to provide the regulatory relief contemplated by § 1024.41(b)(2)(i)(B) only if the borrower has become current or accepts an offer for a loan modification 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 Bureau were to provide relief from the requirements of § 1024.41(b)(1) and (b)(2) upon an offer of a loan modification option but prior to a borrower's acceptance of that option, a servicer would have no obligation to exercise reasonable diligence to complete a loss mitigation application or to notify a borrower of the completion status of such an application during a period of time when the borrower was still delinquent and not in a loan modification trial plan or a permanent loan modification. The Bureau does not believe it is appropriate to offer this regulatory relief when a borrower is delinquent and not in a loan modification trial plan or a permanent loan modification, as such a borrower may be vulnerable to foreclosure activity, the assessment of default related costs, or both during that time. Similarly, the Bureau concludes that it is necessary to require a servicer to resume the exercise of reasonable diligence when a borrower fails to perform under a trial loan modification plan offered pursuant to the exception or requests further assistance.

In relieving servicers who evaluate a borrower for a streamlined loan modification on the basis of an incomplete application from the requirements of § 1024.41(b)(1) and (b)(2), the Bureau again emphasizes, as

it did in the proposed rule, that if a borrower does wish to pursue a complete application and receive the full protections of § 1024.41, § 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 are 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 pursuant to § 1024.41(c)(2)(vi)(A).

*Trial loan modification plans—additional protections.* The Bureau received one comment from a consumer advocate commenter specifically urging the Bureau to prohibit foreclosure referral for a borrower who enters a trial loan modification plan that was offered on the basis of an incomplete application pursuant to proposed § 1024.41(c)(2)(vi)(A).

The Bureau is not including a specific provision in § 1024.41(c)(2)(vi) prohibiting foreclosure referral for a borrower who enters a trial loan modification plan that was offered on the basis of an incomplete application pursuant to proposed § 1024.41(c)(2)(vi)(A). The Bureau notes that the special COVID-19 loss mitigation procedural safeguards that the Bureau is adopting in this final rule as § 1024.41(f)(3) will provide additional protection from foreclosure until January 1, 2022, for certain borrowers who enter into a trial loan modification trial plan offered on the basis of an incomplete application pursuant to the exception in § 1024.41(c)(2)(vi)(A).

Though the Bureau is not revising § 1024.41(c)(2)(vi) to provide foreclosure referral protection for a borrower who enters a trial loan modification plan that was offered under the new anti-evasion exception, the Bureau recognizes the importance of ensuring that borrowers who fail to perform under a trial loan modification plan offered pursuant to § 1024.41(c)(2)(vi)(A) or who request further assistance are provided with the information necessary to complete a loss mitigation application. The Bureau also notes that some borrowers who enter into a trial loan modification plan that was offered on the basis of an incomplete application pursuant to § 1024.41(c)(2)(vi)(A) and then fail to perform on that plan may not have received an acknowledgement notice with regard to the most recent loss mitigation application the borrower submitted prior to the servicer's offer of the loan modification under the exception. This could be the case, for

example, when a borrower who was not previously in forbearance contacts their servicer to inquire about loss mitigation options and is offered a streamlined loan modification. The Bureau is therefore revising § 1024.41(c)(2)(vi)(B) to adopt a requirement that, if a borrower fails to perform under a trial loan modification plan offered pursuant to § 1024.41(c)(2)(vi)(A) or requests further assistance, the servicer must send the borrower the notice required by § 1024.41(b)(2)(i)(B), with regard to the most recent loss mitigation application the borrower submitted prior to the servicer's offer of the loan modification under the exception, unless the servicer has already sent that notice to the borrower.

#### Final Rule

For the reasons discussed above, the Bureau is adopting § 1024.41(b)(2)(i)(B) as proposed, with a revision to require an acknowledgement notice under certain circumstances.

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

##### 41(f)(1) Pre-Foreclosure Review Period 41(f)(1)(i)

As noted below, the Bureau proposed conforming amendments to § 1024.41(f)(1)(i) to help implement the proposed special pre-foreclosure review period in proposed § 1024.41(f)(3). The Bureau did not receive any comments on this aspect of the proposal. As discussed below in the section-by-section analysis of § 1024.41(f)(3), the Bureau is not finalizing the special pre-foreclosure review period as proposed and, thus, is not finalizing any corresponding amendments in § 1024.41(f)(1)(i).

##### 41(f)(3) Temporary Special COVID-19 Loss Mitigation Procedural Safeguards

Section 1024.41(f) prohibits a servicer from referring a borrower to foreclosure in several 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 (“first notice or filing” or “foreclosure referral”), 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. Section 41(f)(2) establishes an additional prohibition on making the first notice or filing if the borrower submits a

complete loss mitigation application within a certain timeframe, unless other specified conditions are met. Section 1024.41 generally does not apply to small servicers.<sup>112</sup> However, the pre-foreclosure review period in § 1024.41(f)(1) does apply to small servicers.<sup>113</sup>

#### The Bureau's Proposal

The Bureau proposed 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 have prohibited servicers from making a first notice or filing because of a delinquency from the effective date of the rule until after December 31, 2021. Specifically, the Bureau proposed 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 proposed to add new § 1024.41(f)(3), which would have provided that a servicer shall not rely on paragraph (f)(1)(i) to make the first notice or filing until after December 31, 2021.

The proposed special pre-foreclosure review period was intended to 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. The Bureau proposed the intervention to address concerns that borrowers and servicers will likely both need additional time before foreclosure referral in the months ahead to help ensure borrowers have a meaningful opportunity to pursue foreclosure avoidance options consistent with the purposes of RESPA. As explained in more detail in the proposal, the Bureau is concerned that servicers will face capacity constraints that will slow down their operations and increase error rates associated with the servicing of delinquent borrowers. With respect to borrowers, the Bureau is concerned that borrowers have encountered, or will encounter, obstacles to pursuing foreclosure avoidance options, such as physical barriers that may undermine their ability to pursue foreclosure avoidance options sooner or confusion caused by the present circumstances that may have interfered with their ability to obtain and understand important information

<sup>112</sup> 12 CFR 1024.30(b)(1).

<sup>113</sup> 12 CFR 1024.41(j).

about the status of their loan and their foreclosure avoidance options. A servicer facing capacity constraints will be less able to dedicate the resources necessary to borrowers who are facing these obstacles.

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. The Bureau requested comment on alternatives that could narrow the scope of the special pre-foreclosure review period while mitigating harm that could arise from a surge in loss mitigation-related default servicing activity during a period when borrowers might need a lot of assistance. The Bureau recognized that, if adopted as proposed, the special pre-foreclosure review period could have prevented a servicer from making the first notice or filing even in circumstances where additional time would merely delay rather than prevent avoidable foreclosure. However, the Bureau was concerned that alternatives would be difficult to craft and implement, particularly under very tight time frames. The Bureau believed that the straightforward and simple “date certain” approach in the proposal would be easy to implement, and its brevity would partially mitigate concerns. The alternatives discussed in the Proposal included options to (1) use a date certain other than December 31, 2021; (2) provide exemptions from the December 31, 2021 date certain; or (3) adopt a different approach such as requiring a grace period after exiting forbearance, keying the special pre-foreclosure review period to the length of the delinquency, or ending the special pre-foreclosure review period on a date that is based on when a borrower’s delinquency begins or forbearance period ends, whichever occurs last. The Bureau explained that it believed each option carried its own set of advantages and disadvantages.

For the reasons discussed below, the Bureau is not finalizing the special pre-foreclosure review period as proposed. Instead, as finalized, § 1024.41(f)(3) will temporarily provide a more tailored procedural protection to minimize avoidable foreclosures in light of a potential wave of loss mitigation-related default servicing activity during a period when borrowers are also likely to need extra assistance. Final § 1024.41(f)(3) generally requires a

servicer to ensure that one of three temporary procedural safeguards has been met before making the first notice or filing because of a delinquency: (1) The borrower submitted a completed loss mitigation application and § 1024.41(f)(2) permits the servicer to make the first notice or filing; (2) the property securing the mortgage loan is abandoned under state law; or (3) the servicer has conducted specified outreach and the borrower is unresponsive. The temporary procedural safeguards are applicable only if (1) the borrower’s mortgage loan obligation became more than 120 days delinquent on or after March 1, 2020; and (2) the statute of limitations applicable to the foreclosure action being taken in the laws of the State where the property securing the mortgage loan is located expires on or after January 1, 2022. This temporary provision will expire on January 1, 2022, meaning that the procedural safeguards in § 1024.41(f)(3) would not be applicable if a servicer makes the of the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process on or after January 1, 2022.

#### Comments Received

Most commenters addressed the proposed special pre-foreclosure review period. The comments covered issues ranging from general support and opposition to specific aspects of the proposal, including specific suggestions on overall scope.

*General Support and Opposition.* A number of commenters expressed general support for the Bureau’s stated goals underlying the proposal. While most commenters suggested changes to the proposal, several, including at least one industry commenter, an individual, and a consumer advocate commenter, urged the Bureau to finalize as proposed. Those who wanted to finalize the special pre-foreclosure review period as proposed (the “proposed approach”) argued, for example, that the proposed approach struck the right balance between minimizing costs to servicers and allowing sufficient time for loss mitigation review, and that the proposed approach would create clarity and certainty to customers who may have become disengaged because of confusion created by evolving requirements.

A group of State Attorneys General expressed general support for the proposed special pre-foreclosure review period because they believed it would provide a modest expansion of current requirements that would bring fairness to borrowers who have no control over

who owns their loans. Other commenters who generally supported the proposed special pre-foreclosure review period stated that they believed the proposed approach would give time for borrowers to recover economically and explore loss mitigation options to avoid foreclosure. Some commenters also cited racial equity concerns, explaining that unnecessary foreclosures would have serious negative consequences on communities of color, and that the proposal could help address those concerns. A consumer advocate commenter echoed and amplified the Bureau’s concerns described in the proposal. That commenter provided additional support and asserted that there will be a spike of hundreds of thousands of seriously delinquent mortgage borrowers this fall, that there is a serious concern that servicers will be unprepared because of problems some servicers exhibited over the last year, and that unnecessary foreclosures that could occur as a result would cause serious harm.

Commenters who expressed general opposition to the proposed special pre-foreclosure review period cited a range of concerns related to, among other things, the Bureau’s assumptions, the effect the intervention would have on the housing markets, mortgage markets, and servicer liquidity, and the Bureau’s authority, each discussed more fully below.

After considering the comments, the Bureau is persuaded that it should not finalize the proposed special pre-foreclosure review period as proposed. Instead, the Bureau is adopting a more narrowly tailored approach that balances the goals of foreclosure avoidance in light of servicer capacity and borrower confusion concerns while also allowing servicers to proceed with foreclosure referral where additional procedural safeguards and time are unlikely to help, or are unnecessary to give, a borrower pursue foreclosure avoidance options. This more narrowly tailored approach adopts aspects of the original proposal, but also incorporates exceptions on which the Bureau sought and received comment that address circumstances where additional procedural safeguards and time are least likely to be beneficial. Because the Bureau is adopting this more narrowly tailored approach, the Bureau also believes it is appropriate to now refer to this intervention as Temporary Special COVID-19 Loss Mitigation Procedural Safeguards, or procedural safeguards, to better reflect the temporary and targeted nature of the requirement.

The Bureau continues to believe the proposed approach would be simple to

implement and would give time and flexibilities to servicers and borrowers to identify foreclosure alternatives in light of the anticipated wave of loss mitigation-related default servicing activity. However, the Bureau is also concerned that the proposed approach would temporarily prevent servicers from making the first notice or filing where doing so is the best remaining option (because, for example, the borrower does not qualify for a foreclosure alternative and delaying the first notice or filing would do nothing more than increase the borrower's delinquency). Further, the Bureau is persuaded that the proposed approach would not have sufficiently encouraged borrowers and servicers to work together towards a foreclosure alternative because it did not include incentives for borrowers or servicers to act promptly. Instead, it may have incentivized borrowers and servicers to delay any communications because it would have imposed a foreclosure restriction that applied regardless of the specific circumstances.

*Inaccurate Assumptions.* A number of commenters challenged the Bureau's stated assumptions underlying the proposed special pre-foreclosure review period and argued that the proposed special pre-foreclosure review period is unnecessary. For example, a number of industry and individual commenters argued that the Bureau was wrong to assume that there will be a wave of consumers seeking loss mitigation later this year. They argued that the number of borrowers who need loss mitigation assistance later this year will be much smaller than the Bureau predicted because the economy is improving, borrowers have already begun exiting forbearance,<sup>114</sup> and borrowers who can no longer afford their homes can avoid foreclosure by selling their homes because most borrowers have equity in their homes.<sup>115</sup> One industry commenter cited a recent report indicating that the rate of foreclosures over the next two years is expected to be consistent with the historical average.

Some commenters also argued that it was wrong to assume that servicers will

experience capacity issues. For example, an industry commenter argued that most borrowers who may exit forbearance this fall will not require significant servicer resources because they will qualify for a loss mitigation option that requires few servicer resources, such as a payment deferral or streamlined loan modification. That commenter also argued that, to the extent any capacity concerns exist, they relate to servicers' ability to implement and communicate changing regulatory and investor requirements, and not to volume. The commenter stated that the proposal would heighten that concern.

A number of commenters, including consumer advocate commenters, industry commenters, and individuals, argued that it was wrong to assume that the special pre-foreclosure review period would encourage or facilitate loss mitigation review. They generally argued that the proposal was nothing more than an extended foreclosure moratorium because it would prevent servicers from making the first notice or filing without imposing any affirmative loss mitigation review requirements, and that such an intervention would do nothing more than delay, rather than prevent, any increased foreclosure activity. One of these industry commenters also argued that the proposal would do nothing to resolve borrower confusion concerns or to prompt communications and would instead cause borrowers to further delay contacting their servicers.

Because they believe the Bureau's assumptions are wrong, several commenters argued that the proposed intervention would not help borrowers and could harm them. Some commenters argued that the proposal would be unhelpful because servicers must already comply with current investor, Federal law, and State law requirements that would render any potential protections created by the rule irrelevant. Some commenters argued that the proposal would harm borrowers by, for example, allowing the borrower's past due debt to accumulate and artificially delay opportunities to exit while home prices are elevated. Other commenters, who argued that the proposal essentially extends the moratorium for all borrowers to a date certain, expressed concern that this approach could harm borrowers, especially borrowers with pre-pandemic delinquencies, by leaving them with no exit strategy. For example, an industry commenter argued that 18 months is the practical limit of the beneficial effect of forbearance and stated that payment deferrals and streamlined loan modifications may not be available to

borrowers who have longer delinquencies. Others expressed concern that the proposal could make bankruptcy and loan modification less likely if the size of the borrower's default becomes unmanageable.

An industry commenter argued that the Bureau was wrong to assume that borrowers will incur unnecessary fees, stating that fees associated with an erroneous foreclosure referral are not recoverable from the borrower.

The Bureau acknowledges that it is impossible to predict what will occur later this year, and thus, it is possible that some of the Bureau's assumptions will prove to be inaccurate. However, available data show that servicers could be faced with potentially unprecedented volumes of loss mitigation activity later this fall when approximately 900,000 borrowers could become eligible for foreclosure referral at around the same time. Some of these borrowers will likely exit forbearance before September 1, and many may opt into payment deferrals or streamlined loan modifications that are less resource intensive than full loss mitigation evaluations. However, servicers will likely still need to process a high volume of borrowers in the fall to determine eligibility for these streamlined options and to otherwise assist with related issues, potentially straining servicer resources. Further, even if most borrowers take advantage of streamlined options, borrowers needing additional assistance, including through a full evaluation based on a complete loss mitigation application, could still be significant. And, while many affected borrowers are likely to have equity in their homes, considerable servicer resources may be necessary in the fall to assist borrowers in assessing whether selling their home is their best available, or preferred, option. Foreclosure referral could limit those borrowers' options and frustrate those borrowers' ability to pursue foreclosure alternatives. As a result, and as discussed in more detail in the proposal, servicers are likely to nevertheless face capacity constraints that could increase error rates.

Further, because of unique circumstances created by the pandemic, borrowers may be delayed in seeking loss mitigation assistance and may face obstacles that delay their efforts, which will increase the likelihood that a surge of borrowers will need assistance during this critical period. For example, as discussed in more detail in the proposal, borrowers may have received outdated or incorrect information that delays their requests for loss mitigation options, or they may have deferred

<sup>114</sup> An industry commenter argued that 25 percent of the loans included in the Bureau's assumptions will not qualify for the six-month extension of forbearance (for a maximum of 18 months) because they are not government agency or GSE loans, and that servicers have already begun reaching out to those borrowers.

<sup>115</sup> Commenters generally made broad statements that the housing prices have been increasing, although some pointed to specific statistics. For example, an industry commenter cited a report indicating that 80 percent of homes have at least 20 percent equity.



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.

As some commenters emphasized, if these obstacles prevent borrowers from having a meaningful opportunity to pursue foreclosure alternatives before foreclosure referral, the harm could be severe.

The Bureau acknowledges that the proposed special pre-foreclosure review period was not sufficiently targeted to address the need for procedural safeguards in light of the scope of the anticipated wave of loss mitigation applications, and could harm borrowers if, for example, the review period were to cause borrowers to delay communicating with their servicers about foreclosure avoidance options, and the borrowers' delay in seeking foreclosure avoidance options causes borrowers to lose eligibility for a foreclosure alternative or to incur additional costs. Further, the Bureau is persuaded by comments that, if a broad swath of borrowers all simply delay seeking foreclosure avoidance options, an even larger number of borrowers may become eligible for foreclosure referral at around the same time. To address these concerns, the Bureau is finalizing narrower temporary loss mitigation procedural safeguards that the Bureau believes will facilitate and encourage loss mitigation reviews while reducing the risk of servicer errors that cause borrower harm in light of the anticipated wave of loss mitigation-related default servicing activity and obstacles facing consumers discussed above. See the section-by-section analysis of § 1024.41(f)(3)(i) through (iii) for additional discussion.

**Moral Hazards and Market Effects.** Many commenters, including individuals and industry commenters, expressed concern that the proposed special pre-foreclosure review period would harm the housing or mortgage markets by driving up housing prices and reducing the availability of credit, which could harm first time homebuyers and renters who may be priced out of the market. At least one commenter expressed concern that these

issues could widen the racial wealth gap. Others argued that, because most borrowers have equity, the proposal and the effects it would cause on the housing market are unjustified. Relatedly, a number of individual commenters expressed concern that the proposal would create moral hazards and would be inequitable. For example, some commenters expressed concern that the proposal would incentivize borrowers who were not suffering a financial hardship to skip payments or not bring their mortgage loan obligations current while servicers were prohibited from making the first notice or filing, while at the same time first time home buyers could be prevented from purchasing a home because of rising prices. They also expressed concern that borrowers would be allowed to live in their homes for free for many years because the court system could be backed up when foreclosures are eventually allowed to proceed.

An industry commenter expressed concern that the proposal would further reduce credit availability, particularly for borrowers with less-than-perfect credit. The commenter argued that the private label securities market is capable of providing safe and responsible access to credit to those borrowers, but may be more hesitant to do so if they are subject to strict restrictions and are left without support relative to the support that other markets receive.

While the Bureau appreciates markets and moral hazard concerns, the Bureau believes that the final rule, as revised from the proposal, will mitigate these concerns. Although it is possible that the final rule could affect housing markets, housing markets could also be affected if the Bureau does not finalize consumer protections because the circumstances could lead to an upsurge of foreclosures that could have otherwise been avoided, which would in turn affect housing prices. It is also true that a small number of borrowers may take advantage of the procedural safeguards under the final rule even if they could resume payments without assistance, but the Bureau is not aware of any evidence indicating that a significant number of borrowers would do so. Using data from 2012 to 2015, which may not be directly comparable to the current economic crisis, recent economic research finds that adverse events were a necessary condition for 97 percent of mortgage defaults, and not solely because borrowers were underwater. This research suggests that moral hazard concerns have generally

been overstated in the past.<sup>116</sup> Further, the final rule should reduce this risk because the final rule will only limit a servicer's ability to proceed with the first notice or filing in limited circumstances. Finally, while the final rule will impose costs on servicers, the protections are narrowly tailored and apply for a limited period of time. Thus, costs should be minimized compared to the proposal and they are unlikely to majorly contribute to credit access concerns. For these reasons, the Bureau does not believe that these issues present a significant concern that would justify curtailing consumer protections.

**Servicer liquidity concerns.** Several industry commenters expressed concern that the proposed special pre-foreclosure review period could cause a strain on servicer liquidity. For example, an industry commenter noted that some servicers have already experienced strain in connection with the lengthy forbearances and stated that the proposal could deepen that strain. The commenter explained that, while updates to GSE policies mitigated some liquidity concerns, servicers would be required to continue advancing payment for escrow items and other costs, which could cause additional strains. The Bureau appreciates these concerns. However, as discussed herein, the Bureau is finalizing a more targeted, narrower intervention that should mitigate these concerns because it is limited in duration and scope, such that it will not delay a servicer from making the first notice or filing except in certain circumstances for a brief period of time.

**Legal authority.** Several industry commenters questioned the Bureau's legal authority for the proposed special pre-foreclosure review period, arguing, among other things, that the Bureau lacks legal authority under RESPA for the broad intervention proposed.<sup>117</sup> A few of these industry commenters further stated that, if the Bureau moved forward with the intervention, it would be appropriate to narrow it to include several exceptions, including for nonresponsive borrowers or borrowers

<sup>116</sup> See Peter Ganong & Pascal Noel, *Why Do Borrowers Default on Mortgages? A New Method for Causal Distribution*, (Becker Friedman Inst., Working Paper No. 2020-100, 2020), [https://bfi.uchicago.edu/wp-content/uploads/BFI\\_WP\\_2020100.pdf](https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_2020100.pdf).

<sup>117</sup> Several commenters also stated that the proposed pre-foreclosure review period raised constitutional concerns, including under the First Amendment and Article I, Section 10, Clause 1 (the Contract Clause). The Bureau has considered these arguments and concludes that the proposed pre-foreclosure review intervention and the final rule's procedural safeguards are fully consistent with constitutional requirements. The Bureau further believes that the final rule adequately addresses commenters' underlying equitable concerns.

that would not qualify for loss mitigation options.

As described in Part IV (Legal Authority), Section 19(a) of RESPA 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. 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. Section 6(k)(1) of RESPA specifically prohibits servicers from, among other items, failing to take timely action to respond to borrower requests to correct errors.<sup>118</sup>

The Bureau's temporary special COVID-19 loss mitigation procedural safeguards are intended to achieve these RESPA consumer protection purposes, including providing procedural protections to help ensure that consumers (1) are appropriately evaluated for foreclosure avoidance options in light of an anticipated wave of loss mitigation applications causing servicer capacity constraints and (2) do not incur the potential unnecessary costs and fees associated with foreclosures that can be avoided. The temporary special COVID-19 loss mitigation procedural safeguards are also intended to minimize the potential wave of borrowers who may seek loss mitigation at the same time, which could result in increased servicer errors or an inability by servicers to take timely action to respond to borrowers requests to correct errors.

Further, as described below, under the section-by-section analyses of § 1024.41(f)(3)(ii)(A) through (C), the Bureau's targeted loss mitigation procedural safeguards will enable servicers to move forward with foreclosure if the property securing the mortgage loan is abandoned under State or municipal law, and in circumstances where a borrower is unresponsive or does not qualify for loss mitigation options. The Bureau believes these new procedural safeguards respond to comments that the original proposal may have been overly broad and better ensure that the rule is tailored to preventing avoidable foreclosures.

*Time Period Covered.* The proposed special pre-foreclosure review period would have ended on a date certain,

meaning that it would have applied from the effective date of the rule through December 31, 2021. Some commenters expressing concern about the proposed special pre-foreclosure review period argued, for example, that it would provide limited protection to a small subset of borrowers who become eligible for foreclosure referral between the effective date of the rule and December 31, 2021. These commenters expressed concern that that this could incentivize foreclosure referral before the rule becomes effective, and that it would not provide protections for borrowers exiting forbearance just before, or after, December 31, 2021.

The Bureau believes the approach under final § 1024.41(f)(3) is better tailored than the proposed approach to facilitate loss mitigation review. However, the Bureau concludes that final § 1024.41(f)(3), like the proposed special pre-foreclosure review period, should apply only for a limited period of time. As described more in the section-by-section analysis of § 1024.41(f)(3)(iii), final § 1024.41(f)(3) will apply during the same period of time that would have been covered by the proposed special pre-foreclosure review period, *i.e.*, from the effective date of the rule through December 31, 2021. While this is a very short period of time, and some borrowers experiencing COVID-19-related hardships will likely be exiting forbearance or remain delinquent long after December 31, 2021, the Bureau believes that this is the critical period of time when current rules may be insufficient because servicers are most likely to suffer capacity issues, which could also exacerbate concerns that borrowers could face obstacles to pursuing loss mitigation options during that period. The Bureau expects that servicers will have fewer capacity concerns before August 31, 2021, and after December 31, 2021, because the volume of borrowers seeking loss mitigation assistance during those timeframes should be more staggered and much lower. While there may be some risk of servicers rushing to foreclose on those loans subject to the Bureau's final temporary procedural safeguards, based on its expertise and experience in the mortgage servicing markets, the Bureau believes that servicers are more likely to prioritize soliciting borrowers for loss mitigation during the few week gap between the anticipated end of nationwide foreclosure moratoria and the effective date of the Bureau's rule. Commenters offered no evidence to suggest otherwise, much less that any such

foreclosure filings will be prompted by the Bureau's own rule. The Bureau also notes that existing regulatory requirements, including Regulation X, prohibitions against unfair, deceptive, or abusive practices, and State law, apply to borrowers who become eligible for foreclosure referral before August 31, 2021, or after December 31, 2021. The Bureau intends to use the full scope of its supervision and enforcement authority to ensure that servicers comply with those existing requirements.

*Potential Exceptions.* As noted above, the Bureau sought comment on whether, if it adopted a date certain approach, it should add exceptions that would allow a servicer to make the first notice or filing before December 31 (the "date certain approach with exceptions" approach). The Bureau solicited comment on possible exceptions where the servicer (1) completed a loss mitigation review of the borrower and the borrower was not eligible for any non-foreclosure option or (2) made certain efforts to contact the borrower and the borrower did not respond to the servicer's outreach. Many industry commenters supported finalizing a date certain approach with exceptions (or preferred it over the proposed approach or other alternatives). These commenters argued, for example, that adding exceptions would ensure that the final rule protects borrowers who need it while allowing foreclosure to proceed where additional time is unlikely to help the borrower or the servicer.

A number of consumer advocates and some industry commenters opposed adding exceptions to the date certain approach. These commenters expressed concern that, for example, the exceptions would swallow the rule, would fail to provide appropriate protections to communities of color, or would increase the likelihood of servicer error and create unnecessary confusion without adding any benefits.

After considering these comments and the general comments summarized above, the Bureau believes that allowing servicers to make the first notice or filing in certain circumstances is important both for purposes of consumer protection and for the proper functioning of the market. As discussed in detail below and in the section-by-section analysis of § 1024.41(f)(3)(ii) through (iii), to address these concerns, the Bureau is not finalizing the special pre-foreclosure review period as proposed and is instead finalizing a more tailored procedural safeguards approach to minimize avoidable foreclosures in light of a potential wave

<sup>118</sup> 12 U.S.C. 2605(k)(1).

of loss mitigation applications. The Bureau believes that the approach taken in final § 1024.41(f)(3) should help encourage borrowers and servicers to work together to pursue foreclosure alternatives while allowing servicers to make the first notice or filing if the servicer has given the borrower a meaningful opportunity to pursue loss mitigation options or additional time is unlikely to result in foreclosure avoidance.

*Unresponsive Borrower.* The Bureau specifically sought comment on whether to include a potential exception if the servicer has exercised reasonable diligence to contact the borrower and has been unable to reach the borrower (“unresponsive borrower exception”). A number of industry commenters supported an unresponsive borrower exception. These commenters explained that there is always a population of borrowers who will not respond to servicer outreach until after foreclosure referral occurs, at which point the referral will prompt the borrower to reach out to their servicer and explore foreclosure alternatives. Some commenters also expressed concern that prohibiting foreclosure referral in these circumstances could unintentionally create a larger wave of foreclosures later because the delinquent amounts will continue to accrue, and borrowers may lose their ability to obtain a foreclosure alternative.

A group of consumer advocate commenters expressed concern that an exception for unresponsive borrowers would encourage less rigorous and less effective servicer outreach. A State elected official expressed opposition to the exception and noted that the pandemic has created unique burdens that could increase the likelihood that a borrower is unresponsive over a short period of time, such as hospitalization of the borrower or a family member or additional caregiving responsibilities.

Commenters offered various ideas related to the scope and framing of an unresponsive borrower exception, including suggestions on what types of outreach should qualify, the timeframe for such outreach, and when a borrower should be considered unresponsive.

After considering these comments, the Bureau concludes that further delaying servicers from making the first notice or filing for delinquent borrowers who are unresponsive could harm both the delinquent borrower and the broader housing market. As explained in the section-by-section analysis of § 1024.41(f)(3)(ii)(C) below, the Bureau is finalizing temporary special COVID-19 loss mitigation procedural safeguards that should help ensure servicers will

not be prohibited from making the first notice or filing in these situations.

*Completed Loss Mitigation Application Exception.* The Bureau also specifically sought comment on whether to include an exception 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 (the “completed loss mitigation application exception”). A number of industry commenters supported this type of exception. These commenters explained that a completed loss mitigation application exception would ensure that servicers focus their limited resources on borrowers who are eligible for loss mitigation options and who express an interest in home retention, while allowing borrowers for whom foreclosure is the best option to proceed without unnecessarily stripping their equity. An industry commenter expressed its belief that such an exception would allow foreclosure referral to occur for a small subset of borrowers without increasing borrower harm to the extent that it would outweigh other concerns, such as the proper functioning of the housing market. This commenter also noted that borrowers may become eligible for State assistance after foreclosure referral, including certain mediation and loss mitigation programs, which the commenter stated are highly successful and may lead to better results for the borrower. Another industry commenter expressed support for this type of exception, noting that it has seen dramatic declines in bankruptcy filings and that it is concerned that continuing to delay foreclosure for borrowers that have already been evaluated for non-bankruptcy alternative will lessen the likelihood of successful bankruptcy reorganization. This commenter explained that a successful bankruptcy reorganization is much more likely if it occurs before large arrearages have accumulated.

Commenters who opposed a completed loss mitigation application exception argued, for example, that a borrower’s financial situation may rapidly change, and that the borrower should not be denied a second chance at loss mitigation. A group of consumer advocate commenters expressed concern that the exception would allow servicers to proceed with foreclosure referral before the borrower has a full opportunity to be considered for loss mitigation options.

Commenters also offered various ideas relating to the scope of any complete loss mitigation application exception that largely revolved around

limiting the exception based on the date the review occurred.

After considering these comments, the Bureau concludes that further delaying servicers from making the first notice or filing if the servicer has already determined that the borrower does not qualify for a non-foreclosure alternative is unlikely to help borrowers or servicers. As explained in the section-by-section analysis of § 1024.41(f)(3)(ii)(A) below, the Bureau is finalizing temporary special COVID-19 loss mitigation procedural safeguards that should help ensure servicers that servicers are permitted to make the first notice or filing in these situations.

*Additional Exceptions.* Commenters proposed a number of additional exceptions that they believed would allow servicers to proceed with foreclosure referral without significantly harming borrowers. For example, some commenters, including consumer advocate commenters, urged the Bureau to require servicers to offer specific loss mitigation options before referral. An industry commenter suggested allowing foreclosure to proceed if the borrower has not entered into a forbearance plan or loss mitigation process. Another industry commenter suggested adding an exception for servicers who have followed program loss mitigation requirements for agency or GSE loans. The Bureau declines to adopt the additional exceptions suggested by commenters and is instead finalizing temporary special COVID-19 loss mitigation procedural safeguards, as discussed below. Among other reasons, the Bureau believes that incorporating additional ideas offered by commenters would add complexity and costs. The Bureau believes its revised approach strikes the right balance of ensuring borrowers have a meaningful opportunity to pursue foreclosure alternatives while allowing servicers to proceed with foreclosure referral when additional time is unlikely to aid in that goal.

*Potential Alternative Approaches.* The Bureau solicited comment on several alternatives to the proposed special pre-foreclosure review period, including imposing a “grace period” within which servicers could not make the first notice or filing for a certain number of days after the borrower exited forbearance, keying the special pre-foreclosure review period to the length of the borrower’s delinquency, or ending the special pre-foreclosure review period on a date that is based on when a borrower’s delinquency begins or forbearance period ends, whichever occurs last.

Most consumer advocates preferred a grace period approach to the proposed date certain approach, and at least one industry commenter supported it. Commenters who preferred the grace period approach generally believed that it would give most COVID-19-affected borrowers time to find an affordable solution without swamping servicers with a single date on which foreclosure referrals may begin because it would continue to apply after December 31, 2021. These commenters argued that it takes significant time and effort to move borrowers from a forbearance plan to a sustainable permanent solution.

Few commenters addressed other alternatives, although at least one consumer advocate commenter expressed support for an alternative approach that would apply a pre-foreclosure review period based on the later of the date the borrower's delinquency begins or forbearance period ends. However, another consumer advocate commenter opposed that approach because they were concerned that it provided the weakest protections to borrowers who need it most. Another commenter urged the Bureau to develop a solution that would focus on making contact with the borrower and determining which foreclosures can be avoided, and that the Bureau should provide a soft landing for borrowers who cannot avoid foreclosure.

A few commenters suggested applying a different date certain for various reasons. At least one commenter suggested applying a more flexible date certain that is tied to the last-announced forbearance extensions.

A number of commenters, including individual, consumer advocate, and industry commenters, suggested the Bureau consider different alternatives that were not specifically discussed in the proposed rule, such as implementing the California Homeowner's Bill of Rights, prohibiting foreclosure referral until the later of a date certain or 120 days after forbearance, funding additional outreach to borrowers, or requiring servicers to offer specific loss mitigation options.

The Bureau declines to adopt one of the alternatives suggested by commenters and is instead finalizing temporary special COVID-19 loss mitigation procedural safeguards, as discussed below. Although the Bureau agrees that a grace period approach would offer some advantages, it also has several disadvantages. For example, it would impose restrictions for a longer period of time, well beyond the critical period this fall identified by the Bureau,

and would leave some borrowers unprotected during the period of time when the Bureau finds intervention is most needed to help ensure borrowers have a meaningful opportunity to pursue foreclosure avoidance options consistent with the purposes of RESPA. The Bureau believes that final § 1024.41(f)(3), which imposes procedural safeguards for the narrow period of time through the end of 2021 when a borrower's ability to pursue foreclosure avoidance options is most likely to be frustrated, is more appropriately tailored to facilitate loss mitigation review during the period of time when existing requirements may be insufficient. As noted herein, the Bureau intends to use the full scope of its supervision and enforcement authority to ensure that servicers comply with existing requirements.

*Scope.* Under the proposed rule, the special pre-foreclosure review period would have applied to all delinquent loans that are secured by the borrower's principal residence, regardless of when the first delinquency occurred. The Bureau sought comment on whether this category of loans was the appropriate scope of coverage for the proposed special pre-foreclosure review period. Many commenters addressed this question. Some commenters urged the Bureau to adopt a broader scope, while others asked that the scope be narrowed.

For example, some commenters, including consumer advocate commenters, argued that any final rule should apply to borrowers with pre-pandemic delinquencies. These commenters generally argued that borrowers whose delinquencies began before the pandemic are among the most vulnerable because borrowers with longer delinquencies are more likely to need additional assistance from their servicers. In contrast, others, including individuals, industry commenters, and other consumer advocate commenters, argued that the scope should be limited based on the timing of delinquency. These commenters argued, for example, that loans that first became delinquent before the pandemic are unlikely to benefit from an additional delay in foreclosure referral. Some commenters also argued that limiting any foreclosure restriction based on when the mortgage loan became delinquent would ensure the rule is tailored to COVID-19-related delinquencies. These commenters suggested various cutoffs, such as excluding loans that became delinquent before March 1, 2020, that became 120 days delinquent before March 1, 2020, or that had already been referred to foreclosure before March 1, 2020.

Some commenters suggested limiting the scope based on the cause of delinquency so that the provision only applies to borrowers who can demonstrate a financial hardship, with some suggesting an even narrower scope so that it only applies if the financial hardship is COVID-19-related. An individual commenter who indicated they were denied forbearance because they had already used forbearance in connection with a previous financial hardship asked the Bureau to ensure the final rule applies even if the borrower experienced a financial hardship in the past.

Some commenters asked the Bureau to exclude particular loans, such as loans that are not government backed, those that are government backed, loans located in States that already have special COVID-19-related rules, open-end loans, or business-purpose loans. Some commenters also discussed which entities they believe should be subject to any new foreclosure restriction adopted by the final rule. A group of consumer advocate commenters argued that the final rule should apply to small servicers, while an industry commenter and an individual argued that the final rule should exempt small lenders and servicers.

After considering all of the comments addressing the scope of the proposed special pre-foreclosure review period, the Bureau is limiting the scope of the new temporary special COVID-19 loss mitigation procedural safeguards to apply only to mortgages that became more than 120 days delinquent on or after March 1, 2020. Thus, the procedural safeguards are not applicable for a mortgage that became more than 120 days delinquent prior to March 1, 2020, and a servicer may make the first notice or filing before January 1, 2022, without ensuring a procedural safeguard has been met in those circumstances. The Bureau believes this narrowly tailored approach will address a number of concerns raised by commenters without imposing overly burdensome requirements on servicers that could prove impossible to implement by the effective date of the final rule. For example, the Bureau concludes that the final rule should focus on providing relief to borrowers who became severely delinquent near the beginning of the COVID-19 pandemic or after it began. These borrowers are the least likely to have already meaningfully pursued foreclosure alternatives and are the most likely to have suffered a sudden but temporary financial strain and they may have obtained temporary relief, such as forbearance, without understanding the effects of the relief. Final § 1024.41(f)(3)

targets these borrowers because it only applies to mortgage loans that became more than 120 days delinquent after March 1, 2020. Borrowers who became more than 120 days delinquent before that date almost certainly became delinquent for reasons unrelated to the pandemic, and they should have been given a meaningful opportunity under then existing requirements to pursue foreclosure avoidance options before the pandemic began. These borrowers are more likely to have already discussed foreclosure avoidance options with their servicers. This approach is consistent with existing § 1024.41(f)(1)(i), which provides a 120-day period to ensure a borrower has a meaningful opportunity to pursue foreclosure avoidance options. The Bureau chose March 1, 2020, to help ensure that borrowers who became eligible for foreclosure referral just prior to the date on which the COVID-19 national emergency was declared, who are less likely to have been given a meaningful opportunity to pursue foreclosure avoidance options during the first 120 days of their delinquency, are also given procedural safeguards provided by the final rule.

The Bureau believes that requiring servicers to determine the cause of the delinquency would add complexity during a period when servicer capacity may already be strained. Limiting the rule to permit servicers to proceed with foreclosure referral for borrowers with serious delinquencies before the pandemic without applying the temporary special COVID-19 loss mitigation procedural safeguards for those borrowers should generally achieve the same goal while placing less strain on servicers because they already track the delinquency date for every loan.

*Foreclosure Restarts.* Several commenters, including law firms, trade associations, and a government commenter, asked the Bureau to clarify that the special pre-foreclosure review period does not apply to loans that have already been referred to foreclosure, regardless of whether the foreclosure must be “restarted.” “Restarts” should not be an issue under the final rule because the scope of the new temporary special COVID-19 loss mitigation procedural safeguards is limited to mortgage loan obligations that became more than 120 days delinquent after March 1, 2020. Shortly thereafter, beginning on March 18, 2020, a foreclosure moratorium was imposed on most mortgages that prohibited certain foreclosure activities, including making the first notice or filing. Thus, the servicer is unlikely to have made the

first notice or filing in connection with these mortgage loans.

*Statute of Limitations.* At least two commenters urged the Bureau to adopt an additional exception that would permit a servicer to make the first notice or filing if the foreclosure statute of limitations will expire during the period covered by the rule. One industry commenter, for example, expressed concern that any Federal prohibition on making the first notice or filing would not toll the statute of limitations and would permanently prevent the servicer from foreclosing on the property. The Bureau is persuaded that the final rule should not prohibit a servicer from making the first notice or filing if the applicable foreclosure statute of limitations will expire during the period of time covered by the rule.

*Vacant and Abandoned Properties.* A number of commenters, including industry and consumer advocates, urged the Bureau to clarify the extent to which any foreclosure restriction adopted in the final rule applies to abandoned properties, vacant properties, unoccupied properties, and properties with trespassers or squatters. Several urged the Bureau to specifically exempt these properties from any foreclosure restriction that the Bureau adopts and asked the Bureau to define these terms or otherwise provide guidance on how to determine that a property is the borrower’s principal residence.

Commenters explained that the lack of clarity around this issue could prevent servicers from making the first notice or filing even though the borrowers likely no longer have any interest in retaining the property and the condition of the property could negatively affect surrounding properties and communities. However, at least one commenter urged caution, expressing concern that servicers may incorrectly conclude that a property is vacant or abandoned, which is a particular concern during the pandemic because borrowers or their family members may have spent significant time away from their properties. Commenters offered several specific solutions, including proposed definitions of abandoned property.

The Bureau appreciates these concerns and has considered similar issues in prior rulemakings.<sup>119</sup> The Bureau declines to establish general definitions that would apply broadly to Regulation X in this rulemaking. However, the Bureau concludes that additional clarity for purposes of this rulemaking is important to address

heightened concerns that numerous properties may have been abandoned during the extended foreclosure moratorium<sup>120</sup> and to ensure that servicers may make the first notice or filing without further delay when a property has been abandoned. Thus, the Bureau’s final temporary special COVID-19 loss mitigation procedural safeguards will expressly permit a servicer to make the first notice or filing before January 1, 2022, if the property is abandoned under the laws of the State or municipality where the property is located. This is not intended to more broadly define abandoned property or principal residence for purposes of Regulation X. Further, a servicer continues to have flexibility to determine that a property is not the borrower’s principal residence for different reasons, including because it used a different method to determine that the property is abandoned or because the State or municipality in which the property is located does not define abandoned property. However, if a servicer incorrectly applies State or municipal law and makes the first notice or filing on a property that is not abandoned under the laws of the State or municipality in which the property is located, the servicer will have failed to satisfy the procedural safeguard in § 1024.41(f)(3)(ii)(B) and may have violated Regulation X, as well as other applicable law.

This final rule does not address other issues raised in the comments, such as what actions the servicer may take when a property is vacant or occupied by squatters or trespassers. The Bureau considers these issues beyond the scope of this rulemaking, which was not undertaken to clarify the scope of actions servicers may take to address such a vacant or occupied property under the Regulation X servicing provisions. Servicers should determine whether the property is the borrower’s principal residence in those circumstances consistent with existing requirements.

*Definition of First Notice or Filing.* A few commenters, including industry, trade associations and consumer advocates, asked the Bureau to clarify whether sending certain State-mandated disclosures to borrowers, such as notices that are commonly called

<sup>119</sup> 78 FR 60381, 60406–07 (Oct. 1, 2013); 81 FR 72160, 72913, 72915 (Oct. 19, 2016).

<sup>120</sup> Commenters did not provide data on this issue. The proposed rule noted that, of the homes in the foreclosure process, only approximately 3.8 percent are currently abandoned. Even if the number of abandoned properties in the foreclosure process is small compared to the total volume of properties in foreclosure, the Bureau appreciates that the number of abandoned properties may have grown, and that clarity is needed for purposes of this rulemaking.

“breach notices,” would be considered making the first notice or filing and thus prohibited during the proposed special pre-foreclosure review period. These commenters asserted that these State-mandated disclosures have proven to be an effective tool to encourage borrowers to seek foreclosure alternatives. The Bureau does not believe additional clarity is needed to address this issue because current comment 41(f)–1 provides guidance on what documents are considered the first notice or filing for purposes of § 1024.41(f). As noted in that comment, whether a document is considered the first notice or filing is determined on the basis of foreclosure procedure under the applicable State law. Thus, certain State-mandated documents might be considered the first notice or filing and some might not. To the extent State-mandated documents, such as breach notices or acceleration notices are not the first notice or filing, nothing in this rule prevents servicers from sending them.

#### Final Rule

For the reasons stated herein, and after considering all of the comments, the Bureau is not finalizing the proposed special pre-foreclosure review period as proposed and is instead finalizing temporary special COVID–19 loss mitigation procedural safeguards at § 1024.41(f)(3). Final § 1024.41(f)(3) requires a servicer to give a borrower a meaningful opportunity to pursue loss mitigation options by ensuring that one of three procedural safeguards has been met before making the first notice or filing because of a delinquency: (1) The borrower submitted a completed loss mitigation application and § 1024.41(f)(2) permits the servicer to make the first notice or filing; (2) the property securing the mortgage loan is abandoned under State or municipal law; or (3) the servicer has conducted specified outreach and the borrower is unresponsive. The temporary procedural safeguards are applicable only if (1) the borrower’s mortgage loan obligation became more than 120 days delinquent on or after March 1, 2020 and (2) the statute of limitations applicable to the foreclosure action being taken in the laws of the State where the property securing the mortgage loan is located expires on or after January 1, 2022. In addition, the temporary procedural safeguards will expire on January 1, 2022, meaning that the procedural safeguards are not applicable if a servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process before the

effective date of the rule or on or after January 1, 2022.

*Small servicers.* Like the proposal, final § 1024.41(f)(3) does 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>121</sup> The final rule’s temporary procedural safeguards are in § 1024.41(f)(3) and not § 1024.41(f)(1).

*Record retention.* The Bureau is also adding new comment 41(f)(3)–1 to clarify record retention requirements for § 1024.41(f)(3). It provides that, as required by § 1024.38(c)(1), a servicer shall maintain records that document actions taken with respect to a borrower’s mortgage loan account until one year after the date a mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer. It clarifies that, if the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process before January 1, 2022, these records must include evidence demonstrating compliance with § 1024.41(f)(3), including, if applicable, evidence that the servicer satisfied one of the procedural safeguard requirements described in § 1024.41(3)(ii). It also provides examples of information and documents required to be retained, depending on the procedural safeguard on which the servicer relies to make the first notice or filing while § 1024.41(f)(3) is in effect.

The temporary procedural safeguards provisions consist of three parts in § 1024.41(f)(3)(i) through (iii) described more fully below. Section 1024.41(f)(3)(i) describes the general rule requiring a servicer to ensure that one of the procedural safeguards is met for certain loans before making a foreclosure referral and the scope of its coverage. Section 1024.41(f)(3)(ii) describes when a procedural safeguard is met for purposes of § 1024.41(f)(3)(i). Section 1024.41(f)(3)(iii) provides a sunset date after which the temporary special COVID–19 loss mitigation procedural safeguards no longer apply.

#### 41(f)(3)(i) In General

As noted above, the Bureau proposed to add new § 1024.41(f)(3) that would have imposed a special pre-foreclosure review period on certain mortgage loans and would have provided that a servicer shall not rely on paragraph (f)(1)(i) to make the first notice or filing until after December 31, 2021.

<sup>121</sup> 2013 RESPA Servicing Final Rule, *supra* note 11, at 10843.

The Bureau received numerous comments on proposed § 1024.41(f)(3), discussed above in the section-by-section analysis of § 1024.41(f)(3). For the reasons discussed in the section-by-section analysis of § 1024.41(f)(3), the Bureau is not finalizing proposed § 1024.41(f)(3), and is, instead, adopting new § 1024.41(f)(3) to establish new temporary special COVID–19 loss mitigation procedural safeguards.

Final § 1024.41(f)(3)(i) provides that, to give a borrower a meaningful opportunity to pursue loss mitigation options, a servicer must ensure that one of the procedural safeguards described in § 1024.41(f)(3)(ii) has been met before making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process because of a delinquency under paragraph (f)(1)(i) if: (A) The borrower’s mortgage loan obligation became more than 120 days delinquent on or after March 1, 2020; and (B) the applicable statute of limitations will expire on or after January 1, 2022. Both of these elements must be met, and § 1024.41(f)(3) must be in effect prior to the sunset date, for the procedural safeguards to be applicable. See the section-by-section analysis of § 1024.41(f)(3)(iii) for discussion of when § 1024.41(f)(3) will be in effect.

As discussed more fully in part II, most borrowers with loans in forbearance programs as of the publication of this final 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. Many of these borrowers may become immediately eligible for foreclosure referral even though, in light of unique circumstances created by the pandemic, they have not yet pursued or been reviewed for available loss mitigation options. Thus, without regulatory intervention, servicers may make the first notice or filing before those borrowers have had a meaningful opportunity to pursue foreclosure avoidance options. As explained in more detail in the proposed rule and in part II above, this could occur because the expected surge in borrowers seeking loss mitigation assistance later this year could trigger servicer errors that lead to improper foreclosure referrals. This also could occur because borrowers who may have been confused about protections available, or who may have been unable to seek loss mitigation

options because of issues related to the COVID-19 pandemic, may not have adequate time before foreclosure referral to understand their options and pursue them. If borrowers do not have sufficient time before foreclosure referral to pursue foreclosure avoidance options, borrowers could suffer 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, among other things, harms from dual tracking, such as unwarranted or unnecessary costs and fees.

Although current Regulation X, State laws, and investor requirements already impose obligations on servicers that help to ensure borrowers have a meaningful opportunity to pursue foreclosure avoidance options, the Bureau believes that these existing requirements are likely to be insufficient as a result of this unprecedented COVID-19 emergency when a surge of borrowers who were in extended forbearance programs and may have been experiencing unprecedented hardship due to the COVID-19 emergency, are likely to be seeking loss mitigation assistance between September 1 and December 31, 2021. For the reasons discussed herein, including in the section-by-section analysis of § 1024.41(f)(3), the Bureau concludes that the proposed special pre-foreclosure review period would not have sufficiently addressed these concerns. The proposed special pre-foreclosure review period would have imposed a restriction on making the first notice or filing, regardless of the borrower's specific situation, and it would not have provided any incentives for borrowers and servicers to work together to determine if a foreclosure alternative is available before its restrictions ended. As a result, the proposed special pre-foreclosure review period could have prevented servicers from making the first notice or filing in circumstances where doing so could have helped the borrower and where further delays could have potentially caused harm. Without exceptions to the proposed delay in when the first notice or filing could be made, the proposed approach could have caused borrowers and servicers to delay communications, potentially undermining the Bureau's objective to ensure borrowers receive a meaningful opportunity to pursue foreclosure avoidance options.

To address these concerns, the Bureau is now finalizing temporary special COVID-19 loss mitigation procedural safeguards, as described in more detail below and in the section-by-section

analysis of § 1024.41(f)(3)(ii) through 1024.41(f)(3)(ii)(C), that balance the goal of ensuring that borrowers have a meaningful opportunity to pursue foreclosure avoidance options during the expected surge of borrowers seeking loss mitigation assistance later this year, while also recognizing that there may be circumstances where enhanced procedural safeguards are not appropriate and unlikely to accomplish RESPA's purpose of facilitating review for foreclosure avoidance options. These procedural safeguards are modeled on the stated goals of the proposed special pre-foreclosure review period and the various alternatives to that proposal on which the Bureau sought comment. However, instead of prohibiting any foreclosure referrals until a date certain without exceptions, the final rule imposes new temporary special COVID-19 loss mitigation procedural safeguards that apply only to certain mortgage loans and that generally must be satisfied before the servicer makes the first notice or filing until the sunset date of the provision. The Bureau believes these temporary procedural safeguards will provide sufficient incentives to encourage both: (1) Servicers to diligently communicate with borrowers about loss mitigation and promptly evaluate any complete loss mitigation applications; and (2) borrowers to communicate with their servicers.

The Bureau is adopting the temporary special COVID-19 loss mitigation procedural safeguards because the Bureau believes that many borrowers who may become eligible for foreclosure referral this fall may be able to avoid foreclosure if they are given a meaningful opportunity to pursue foreclosure alternatives, but they may not be given that opportunity without regulatory intervention that encourages, and allows time for, servicer outreach and borrower response. The Bureau is concerned, for example, that a surge in loss mitigation applications could make it more difficult for servicers to engage in outreach or for borrowers to contact or work with their servicers, and in some instances, that the wave could result in servicer errors. As described in more detail below, the final rule is intended to balance the goals of encouraging communication between the servicer and borrower to help ensure the borrower has a meaningful opportunity to pursue foreclosure avoidance options, while also allowing the servicer to make the first notice or filing where additional time before foreclosure referral is unlikely to achieve that goal. For example, specifying that servicers can make the

first notice or filing when borrowers are unresponsive is intended to incentivize servicers to engage in outreach, which should also increase the likelihood that borrowers will respond to servicer outreach, and work towards a foreclosure alternative, while allowing the servicer to proceed with foreclosure referral if the borrower does not respond. As another example, specifying that servicers can proceed with foreclosure when a servicer has already considered a borrower for loss mitigation and determined that the borrower does not qualify for a foreclosure alternative should encourage the servicer to promptly seek loss mitigation applications and evaluate them. Servicers could have been discouraged from engaging in outreach and borrowers may have been disincentivized from responding until foreclosure referral was imminent if the Bureau had instead finalized an intervention that delayed foreclosure referrals without any exceptions because they may have viewed earlier efforts as less likely to be productive.

Further, the Bureau believes that final § 1024.41(f)(3) will protect a borrower from servicer errors and delays that may occur during the surge this fall by ensuring that the servicer cannot make the first notice or filing while this provision is in effect if a temporary special COVID-19 loss mitigation procedural safeguard is not met. For example, if the borrower engages with the servicer but is unable to submit a complete loss mitigation application because of a servicer error or delay, the procedural safeguards would provide the borrower with additional time to submit a complete loss mitigation application because it would temporarily prevent the servicer from making the first notice or filing while this provision is in effect.

The temporary special COVID-19 loss mitigation procedural safeguards will generally prevent servicers from making the first notice or filing while this provision is in effect if the borrower and servicer are in communication, but the borrower has not exhausted their loss mitigation options. The Bureau believes that providing this additional time in cases where the servicer is evaluating the borrower for loss mitigation or is in communication with the borrower is important to protect borrowers from errors that may occur due to capacity issues.

#### 41(f)(3)(i)(A)

Final § 1024.41(f)(3)(i) provides that, to give a borrower a meaningful opportunity to pursue loss mitigation options, a servicer must ensure that one



of the procedural safeguards described in § 1024.41(f)(3)(ii) has been met before making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process because of a delinquency under paragraph (f)(1)(i) if two elements are met. Final § 1024.41(f)(3)(i)(A) sets forth the first of the two elements: That the borrower's mortgage loan obligation became more than 120 days delinquent on or after March 1, 2020. This means that the temporary special COVID-19 loss mitigation procedural safeguards do not apply to mortgage loans that became more than 120 days delinquent before March 1, 2020, and a servicer may make the first notice or filing in connection with those mortgage loans without ensuring a procedural safeguard has been met, as long as all other applicable requirements are met.

As discussed in the section-by-section analysis of § 1024.41(f)(3) above, the Bureau believes that it is appropriate to apply the temporary procedural safeguards to borrowers who became severely delinquent near the beginning of the COVID-19 pandemic or after it because those borrowers are most likely to need additional time before foreclosure referral to have a meaningful opportunity to pursue foreclosure avoidance options. Although borrowers who became more than 120 days delinquent before that date may need significant help to avoid foreclosure, they are less likely to benefit from procedural safeguards for the reasons discussed above.

#### 41(f)(3)(i)(B)

The other element under final § 1024.41(f)(3)(i) provides that the procedural safeguards are only applicable if the statute of limitations applicable to the foreclosure action being taken in the laws of the State where the property securing the mortgage loan is located expires on or after January 1, 2022. In other words, final § 1024.41(f)(3) does not prohibit a servicer from making the first notice or filing if the applicable statute of limitations will expire before the temporary special COVID-19 loss mitigation procedural safeguards expire. As discussed in the section-by-section analysis of § 1024.41(f)(3) above, the Bureau is adopting this element to ensure that the procedural safeguards do not permanently prevent a servicer from enforcing their rights under the security instrument and note.

#### 41(f)(3)(ii) Procedural Safeguards

Final § 1024.41(f)(3)(ii) provides that a procedural safeguard is met if one of three specified conditions is met. As

noted above, the Bureau believes these procedural safeguards will allow a servicer to make the first notice or filing where the borrower is likely to have already had a meaningful opportunity to pursue foreclosure avoidance options or would otherwise not benefit from additional time before foreclosure referral, which should also encourage borrowers and servicers to work together to pursue foreclosure avoidance options before the servicer makes the first notice or filing.

#### 41(f)(3)(ii)(A) Completed Loss Mitigation Application Evaluated

Final § 1024.41(f)(3)(ii)(A) describes the first of the specified procedural safeguards that would allow the servicer to make the first notice or filing while the procedural safeguards are in effect. Specifically, § 1024.41(f)(3)(ii)(A) provides that the servicer has met a procedural safeguard if the borrower submitted a complete loss mitigation application, has remained delinquent at all times since submitting the application, and § 1024.41(f)(2) permits the servicer to make the first notice or filing required for foreclosure. Section 1024.41(f)(2) prohibits a servicer from making the first notice or filing if a borrower submits a complete loss mitigation application during the pre-foreclosure review period in § 1024.41(f)(1) or before the servicer has made the first notice or filing unless (1) the servicer has sent the borrower a notice required by § 1024.41(c)(1)(ii) stating that the borrower is not eligible for any loss mitigation option and the appeal process in § 1024.41(h) is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied; (2) the borrower rejects all loss mitigation options offered by the servicer; or (3) the borrower fails to perform under an agreement on a loss mitigation option.

As explained above, the Bureau believes that this provision will provide appropriate incentives for servicers to engage in meaningful outreach to solicit a completed loss mitigation application from the borrower and to promptly evaluate the application, which should in turn increase the likelihood that the borrower actively engages their servicer to discuss foreclosure alternatives. Unlike the proposed approach, final § 1024.41(f)(3) allows servicers to make the first notice or filing without delay in these circumstances, but otherwise generally prohibits the servicer from doing so unless another procedural safeguard is met or until the temporary

special COVID-19 loss mitigation procedural safeguards expire.

The Bureau also believes that neither the borrower nor the servicer would benefit if the servicer were prohibited from making the first notice or filing in connection with these loans. The servicer will have determined that the borrower does not qualify for a foreclosure avoidance option, and the borrower will have submitted all required documentation to be considered for foreclosure avoidance options and exhausted all appeals to overturn the servicer's decision. Additional protections are not needed because these borrowers will have already been considered for foreclosure avoidance options. While it is possible that the borrower's financial condition could later improve, the Bureau concludes that prohibiting a servicer from making the first notice or filing in these circumstances would at best help a very small number of borrowers while adding substantial costs to servicers and potentially harming the vast majority of affected borrowers by allowing their delinquencies to continue to grow. As noted in the proposed rule, the Bureau understands 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. Servicer policies and procedures must be designed to implement those requirements.<sup>122</sup> Thus, the servicer would be required to re-evaluate the borrower's eligibility for loss mitigation under those requirements if the borrower's financial situation later changes.

#### 41(f)(3)(ii)(B) Abandoned Property

Final § 1024.41(f)(3)(ii)(B) describes the second specified condition that would allow the servicer to make the first notice or filing while procedural safeguards are in effect. Specifically, § 1024.41(f)(3)(ii)(B) provides that the servicer may make the first notice or filing if the property is abandoned according to the laws of the State or municipality where the property is located when the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process. As discussed in response to comments received in the section-by-section discussion of § 1024.41(f)(3) above, the Bureau believes that borrowers and servicers are unlikely to benefit, and could be harmed, if servicers are prohibited from making the first notice

<sup>122</sup> 2013 RESPA Servicing Final Rule, *supra* note 11, at 10836.

or filing in connection with abandoned properties.

Final § 1024.41(f)(3), like the rest of this final rule, only applies to mortgage loans that are secured by the borrower's principal residence. While the Bureau has previously stated that an abandoned property may no longer be a borrower's principal residence, and thus § 1024.41 generally would not apply,<sup>123</sup> the Bureau appreciates that servicers have difficulty in making that determination, which could pose special challenges because of the circumstances presented by the COVID-19 pandemic emergency. Thus, the Bureau is finalizing § 1024.41(f)(3)(ii)(B) to facilitate servicer's processes of determining whether a property is abandoned during the surge by expressly permitting a servicer to make the first notice or filing before January 1, 2022, if the property is abandoned under the laws of the State or municipality where the property is located.

The Bureau notes that this provision is specific to the temporary special COVID-19 loss mitigation procedural safeguards provision and is not intended to more broadly define what is considered an abandoned property or principal residence for purposes of the rest of Regulation X. Further, a servicer continues to have flexibility under Regulation X to determine that a property is not the borrower's principal residence for different reasons, including because it used a different method to determine that the property is abandoned because the State and municipality in which the property is located does not define abandoned property. However, if a servicer incorrectly applies State or municipal law and makes the first notice or filing on a property that is not abandoned under the laws of the State or municipality in which the property is located, the servicer will have failed to satisfy the procedural safeguard in § 1024.41(f)(3)(ii)(B) and may have violated Regulation X, as well as other applicable law.

#### 41(f)(3)(ii)(C) Unresponsive Borrower

Final § 1024.41(f)(3)(ii)(C) describes the third specified procedural safeguard that would allow the servicer to make the first notice or filing while § 1024.41(f)(3) is in effect. Specifically, § 1024.41(f)(3)(ii)(C) provides that the servicer may make the first notice or filing if the servicer did not receive any communications from the borrower for at least 90 days before the servicer

makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and all of the following conditions are met: (1) The servicer made good faith efforts to establish live contact with the borrower after each payment due date, as required by § 1024.39(a), during the 90-day period before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process; (2) the servicer sent the written notice required by section 1024.39(b) at least 10 days and no more than 45 days before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process; (3) the servicer sent all notices required by this section, as applicable, during the 90-day period before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process; and (4) the borrower's forbearance program, if applicable, ended at least 30 days before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process.

This provision is intended to allow a servicer to make the first notice or filing if the servicer has reasonably attempted to contact the borrower and the borrower has been unresponsive. This provision is modeled after the loss mitigation requirements in Regulation X to ease compliance burdens. The Bureau solicited comment on defining an unresponsive borrower based on Home Affordable Modification Program requirements, and commenters suggested several alternative approaches to defining unresponsive borrower. However, the Bureau is not finalizing any of those options due to concerns that servicers would not have sufficient time to adopt new procedures that would satisfy those alternatives or be able to track compliance with these requirements. The Bureau is concerned that servicers would be required to make significant changes to their systems and procedures to meet the standard, which could reduce the likelihood that a servicer would take advantage of it and may further overwhelm servicer capacity during this critical time. The Bureau believes it is important to design this procedure so that servicers can apply it broadly because, as commenters highlighted, the first notice or filing may serve to prompt borrowers who have been unresponsive to contact their servicers, and State programs can help to do the same.

This final rule builds on current Regulation X requirements and adds

additional guardrails that are intended to ensure that the servicer has engaged in sufficient outreach when the borrower is most likely to understand and respond. In particular, this provision requires that four elements be met before a servicer can make the first notice or filing under this provision.

First, new § 1024.41(f)(3)(ii)(C)(1) clarifies that the servicer must make good faith efforts to establish live contact with the borrower after each payment due date, as required by § 1024.39(a), during the 90-day period before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process. This requirement is intended to ensure that the servicer has engaged in sufficient outreach before determining that the borrower is unresponsive. A servicer can satisfy this provision based on activities that occurred before the effective date of this final rule.

Second, new § 1024.41(f)(3)(ii)(C)(2) requires the servicer to send the written notice required by § 1024.39(b) at least 10 days and no more than 45 days before the servicer makes the first notice or filing. Servicers are already required to provide the notice required by § 1024.39(b). This provision adds new timing requirements that are intended to ensure that the servicer has engaged in sufficient outreach during the most critical period before making the first notice or filing on the basis that the borrower is unresponsive. The Bureau believes that receipt of this notice during this period will decrease the likelihood that the borrower has not responded to servicer outreach because they do not understand the importance of communicating with their servicer.

Third, new § 1024.41(f)(3)(ii)(C)(3) requires the servicer to send all notices required by § 1024.41, as applicable, during the 90-day period before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process. Applicable notices may include, for example, the notice required by § 1024.41(c)(2)(iii). The Bureau notes that this provision, as well as § 1024.41(f)(3)(ii)(C)(1) and (2), require strict compliance with all applicable provisions of § 1024.41. This includes all relevant aspects of those provisions, including the timing requirements. Thus, a servicer that has not met existing timing requirements under Regulation X during the relevant period cannot rely on § 1024.41(f)(3)(ii)(C) to make the first notice or filing while the procedural safeguards are in effect, notwithstanding the existing Joint Statement.

<sup>123</sup> 86 FR 18840, 18867 (Apr. 9, 2021). See also 78 FR 60381, 60406-07 (Oct. 1, 2013); 81 FR 72160, 72913, 72915 (Oct. 19, 2016).

Fourth, a servicer is only permitted to make the first notice or filing under new § 1024.41(f)(3)(ii)(C)(4) if the borrower's forbearance program, if applicable, ended at least 30 days before the servicer makes the first notice or filing. Similar to § 1024.41(f)(3)(ii)(C)(1), this requirement is intended to address concerns that a borrower would ignore a servicer's outreach efforts while the borrower is in a forbearance program because the servicer and borrower have already agreed that the borrower will not make payments until a later date. The Bureau is concerned that a borrower may not have a meaningful opportunity to pursue foreclosure avoidance options if a servicer were allowed to deem a borrower unresponsive because the borrower did not communicate with the servicer several months before the borrower's forbearance program was scheduled to end.

The Bureau believes that all of these provisions under § 1024.41(f)(3)(ii)(C) will ensure that the servicer's outreach and the borrower's failure to respond occurs during a period of time when the borrower should expect to be in contact with the servicer.

As noted above, § 1024.41(f)(3)(ii)(C) provides that the servicer may make the first notice or filing if the servicer did not receive any communications from the borrower within a specified period of time. The Bureau is adopting new comment 41(f)(3)(ii)(C)-1 to help clarify what is considered a communication from the borrower. Specifically, comment 41(f)(3)(ii)(C)-1 provides that, for purposes of § 1024.41(f)(3)(ii)(C), a servicer has not received a communication from the borrower if the servicer has not received any written or electronic communication from the borrower about the mortgage loan obligation, has not received a telephone call from the borrower about the mortgage loan obligation, has not successfully established live contact with the borrower about the mortgage loan obligation, and has not received a payment on the mortgage loan obligation. A servicer has received a communication from the borrower if, for example, the borrower discusses loss mitigation options with the servicer, even if the borrower does not submit a loss mitigation application or agree to a loss mitigation option offered by the servicer.

The Bureau is also adopting new comment 41(f)(3)(ii)(C)-2 to clarify that a servicer has received a communication from the borrower if the communication is from an agent of the borrower. The comment explains that 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 that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. Upon receipt of such documentation, the comment explains that the servicer shall treat the communication as having been submitted by the borrower.

This comment clarifies that a borrower who is attempting to communicate with their servicer is afforded the protections of the procedural safeguards, regardless of the substance of the communication from the borrower. The Bureau will closely monitor consumer complaints and examine servicers to ensure that a servicer's procedures have not created obstacles that frustrate a borrower's ability to engage with the servicer or that make borrowers appear unresponsive even though they were attempting to contact the servicer (for example, if servicer phone lines have unreasonably long hold times).

#### 41(f)(3)(iii) Sunset Date

Final § 1024.41(f)(3)(iii) provides that paragraph (f)(3) does not apply if a servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process on or after January 1, 2022. Because the procedural safeguards provisions become effective on August 31, 2021, the provisions also would not be applicable if the servicer makes the first notice or filing before August 31, 2021. As discussed above, the Bureau believes that a significant number of borrowers are likely to be seeking loss mitigation assistance during this period from August 31, 2021 through December 31, 2022. This is the period of time when, in light of the anticipated surge, there is a heightened risk of servicer error, and borrowers may face more difficulty in contacting and communicating with their servicers to meaningfully pursue foreclosure alternatives. This is also the period when existing requirements may be insufficient to ensure borrowers have a meaningful opportunity to pursue foreclosure alternatives and additional requirements could help ensure that the potentially unprecedented circumstances do not result in borrower harm. The Bureau believes that the sunset date will ensure that certain procedural safeguards are in place during the temporary period when borrowers may face the greatest potential harm because of the increase

in borrowers exiting forbearance and the related risks of servicer error and borrower delay or confusion.

#### VI. Effective Date

The Bureau proposed that any final rule relating to the proposed rule 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**. The Bureau sought comment on whether there was a day of the week or time of the month that would best facilitate the implementation of the proposed changes.

The Bureau did not receive comments about a specific day of the week or time of the month may best facilitate implementation of the proposed changes. The Bureau did receive a few general comments on the effective date. These comments generally urged the Bureau to make the final rule effective sooner than August 31, 2021, so that as many borrowers as possible could benefit from the final rule.

As discussed more fully in part II, above, 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 weeks and months. The Bureau is keenly aware of the need for quick action to protect vulnerable borrowers during the unique circumstances presented by the COVID-19 emergency. However, the Office of Information and Regulatory Affairs has designated this rule as a "major rule" for purposes of the Congressional Review Act (CRA).<sup>124</sup> The CRA requires that the effective date of a major rule must be at least 60 days after publication in the **Federal Register**.<sup>125</sup> The Bureau anticipates that August 31, 2021 will be at least 60 days from **Federal Register** publication of this rule. The effective date of this final rule will therefore be August 31, 2021.

While servicers will not have to comply with this rule until the effective date, servicers may voluntarily begin engaging in activity required by this final rule before the final rule's effective date. In certain circumstances, such voluntary activity can establish compliance with the rule after its effective date. For example, if the borrower's forbearance is scheduled to end on September 15th, and a servicer provides the additional information required by § 1024.39(e)(2) during a live contact that occurs before the effective date, but fewer than 45 days before the forbearance program is scheduled to

<sup>124</sup> 5 U.S.C. 801 *et seq.*

<sup>125</sup> 5 U.S.C. 801(a)(3).

expire, the servicer need not provide the information required by § 1024.39(e)(2) again after the effective date. Similarly, certain conduct taking place before the effective date of this rule can satisfy the procedural safeguards described in § 1024.41(f)(3). For a more detailed discussion of the required conduct that can establish compliance, whether completed before or after the effective date of the final rule, please refer to the section-by-section analyses of §§ 1024.39 and 1024.41(f)(3).

While the Bureau declines to adopt an earlier effective date, for the reasons discussed above, the Bureau does not intend to use its limited resources to pursue supervisory or enforcement action against any mortgage servicer for offering a borrower a streamlined loan modification that satisfies the criteria in § 1024.41(c)(2)(vi)(A) based on the evaluation of an incomplete loss mitigation application before the effective date of this final rule.<sup>126</sup>

In addition, some commenters expressed concern that servicers may initiate the foreclosure process between when foreclosure moratoria are set to expire and the August 31, 2021 effective date of this final rule. The Bureau is aware of the concern, but is not adopting an earlier effective date for the reasons discussed above. In addition, as most borrowers in forbearance programs receive protection from foreclosure during the forbearance program,<sup>127</sup> an August 31, 2021 effective date of this final rule ensures that most borrowers exiting forbearance in September, when the Bureau expects a very high volume of forbearance exits, are not at risk of foreclosure immediately when their forbearance program ends. The Bureau recently released a Compliance Bulletin and Policy Guidance (Bulletin) announcing the Bureau's supervision and enforcement priorities regarding housing insecurity in light of heightened risks to consumers needing loss mitigation assistance in the coming months as the COVID-19 foreclosure

moratoriums and forbearances end.<sup>128</sup> The Bulletin articulates the Bureau intends to consider a servicer's overall effectiveness in communicating clearly with consumers, effectively managing borrower requests for assistance, promoting loss mitigation, and ultimately reducing avoidable foreclosures and foreclosure-related costs. It reiterates that the Bureau intends to hold mortgage servicers accountable for complying with Regulation X.

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

### A. Overview

In developing this final rule, the Bureau has considered the potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act.<sup>129</sup> In developing this final 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 final rule. The Bureau provides estimates, to the extent possible, of the potential benefits and costs to consumers and covered persons of the final rule given available data. However, as discussed further below, the data with which to quantify the potential costs, benefits, and impacts of the final 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 final 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.

### C. Baseline for Analysis

In evaluating the benefits, costs, and impacts of this final rule, the Bureau considers the impacts of the final rule 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.<sup>130</sup>

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 this final rule, 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.

As further discussed below, under the baseline, many mortgage borrowers who are currently protected by foreclosure moratoria and forbearance programs will be vulnerable to foreclosure when those programs begin to expire later this year. Bureau analysis using data from the National Mortgage Database showed that Black and Hispanic borrowers made up a significantly larger share of borrowers that were in forbearance (33 percent) or delinquent (27 percent) as reported through March 2021.<sup>131</sup> Whereas, Black and Hispanic borrowers made up 18 percent of all mortgage borrowers and 16 percent of borrowers that were current. Forbearance and delinquency were also significantly more likely in majority-minority census tracts and in tracts with lower relative income.

<sup>130</sup> The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits, costs, and impacts, and an appropriate baseline.

<sup>131</sup> See CFPB Mortgage Borrower Pandemic Report, *supra* note 5.

<sup>126</sup> This statement is intended to provide information regarding the Bureau's general plans to exercise its supervisory and enforcement discretion for institutions under its jurisdiction and does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. In addition, this statement is not intended to be rule, regulation, or interpretation for purposes of RESPA section 18(b) (12 U.S.C. 2617(b)).

<sup>127</sup> See, e.g., 12 CFR 1024.41(c)(2)(iii) (prohibiting a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and certain other foreclosure activity if the borrower is performing pursuant to the terms of a short-term payment forbearance program offered based on the evaluation of an incomplete application).

<sup>128</sup> 86 FR 17897 (Apr. 7, 2021).

<sup>129</sup> Specifically, sec. 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 rules on insured depository institutions and insured credit unions with less than \$10 billion in total assets as described in sec. 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

#### *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 temporary special COVID-19 loss mitigation procedural safeguards (§ 1024.41(f)(3)); (2) the new exception to the complete application requirement (§ 1024.41(c)(2)(vi)); and (3) the clarifications of the early intervention live contact and reasonable diligence requirements (§§ 1024.39(a) and (e); 1024.41(b)(1)).

##### 1. Temporary Special COVID-19 Loss Mitigation Procedural Safeguards

The amendments to Regulation X establish temporary special COVID-19 loss mitigation procedural safeguards that apply from the effective date of the rule until on or after January 1, 2022. The final rule provides that, to give a borrower a meaningful opportunity to pursue loss mitigation options, a servicer must ensure that one of three procedural safeguards has been met before making the first notice or filing because of a delinquency: (1) The borrower submitted a completed loss mitigation application and § 1024.41(f)(2) permits the servicer to make the first notice or filing; (2) the property securing the mortgage loan is abandoned under State or municipal law; or (3) the servicer has conducted specified outreach and the borrower is unresponsive. A mortgage loan is subject to the temporary procedural safeguards if (1) the borrower's mortgage loan obligation became more than 120 days delinquent on or after March 1, 2020 and (2) the statute of limitations applicable to the foreclosure action being taken in the laws of the State where the property securing the mortgage loan is located expires on or after January 1, 2022. This restriction is 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 amendment does not apply to small servicers.

*Benefits and costs to consumers.* The provision would provide benefits and costs to consumers by providing certain borrowers additional time to allow for meaningful review of loan modification and other loss mitigation options to help ensure that those borrowers who can avoid foreclosure through loss mitigation will have the opportunity to do so. The primary benefits and costs to consumers of this additional time for review can be measured by actual avoidance of foreclosure among the set of borrowers for whom the special

procedural safeguards would likely apply.<sup>132</sup>

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 even if the borrower is more than 120 days delinquent. As of late-June, Federal foreclosure moratoria are set to expire on July 31, 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, a significant number of borrowers reached 12 months in a forbearance program in February (160,000) and March (600,000) of 2021.<sup>133</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 forbearance period terminate 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>134</sup> The final rule will be effective on August 31, 2021. Thus, the final rule should reduce

<sup>132</sup> The benefits and costs to consumers will decrease to the extent that additional protections for delinquent borrowers are extended by the Federal government or investors. For instance, if new protections were introduced that prevent foreclosure from being initiated for federally backed mortgages until after January 1, 2022, then the benefits of the provision for borrowers with federally backed mortgages would be reduced or eliminated. Similarly, the costs of the provision to servicers of these loans, as discussed in the "Benefits and costs to covered persons" for this provision, below, would be reduced. The most recent available data from Black Knight indicate that about 1.6 million of the 2.2 million loans in forbearance as of April 2021 are federally backed mortgage loans. The benefits and costs of the provision for remaining loans would likely be largely unaffected. Black Apr. 2021 Report, *supra* note 7.

<sup>133</sup> See Black Jan. 2021 Report, *supra* note 44.

<sup>134</sup> *Supra* note 62 and accompanying text.

foreclosure risk for the large number of borrowers who are expected to exit forbearance between September and December of 2021 and for whom the special procedural safeguards would apply.

The primary benefit to consumers from this provision arises 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 all else equal.<sup>135</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 provision from a reduction in foreclosure 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 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

<sup>135</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 11, at 10832.

average benefit to preventing foreclosure and the number of foreclosures that could be potentially prevented as a result of the special procedural safeguards.

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 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>136</sup> Delinquent borrowers in the last recession had significantly less equity in their homes compared to borrowers in the current crisis.<sup>137</sup> All else equal, this means that fewer borrowers in the current crises are expected to enter into foreclosure as a result of their equity position compared to the last crisis, making it difficult to generalize foreclosure outcomes from the last recession to the current period. Overall, 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 provision,

<sup>136</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>137</sup> A recent Bureau report using data from the National Mortgage Database (NMDB) showed that borrowers with an LTV ratio above 95 percent, a common measure of whether a borrower may be underwater on their mortgage and potentially more vulnerable to foreclosure, made up 5 percent of borrowers that were delinquent, 1 percent of borrowers that were in forbearance, and less than 1 percent of borrowers that were current as reported through March 2021, [https://files.consumerfinance.gov/f/documents/cfpb\\_characteristics-mortgage-borrowers-during-covid-19-pandemic\\_report\\_2021-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_characteristics-mortgage-borrowers-during-covid-19-pandemic_report_2021-05.pdf). Similar evidence from the Urban Institute showed that during the five years preceding Q4 2009, the rate of serious delinquency and home price appreciation had a strong negative relationship. By contrast, this relationship was weak in Q4 2020, <https://www.urban.org/urban-wire/understanding-differences-between-covid-19-recession-and-great-recession-can-help-policy-makers-implement-successful-loss-mitigation>.

any of which can lead to significant under or overestimation of the benefits.

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 Office 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>138</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>139</sup> and adverse medical conditions.<sup>140</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>141</sup> The HUD study

<sup>138</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/>.

<sup>139</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>140</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>141</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.*,

referenced above estimates the average effect of foreclosure on neighboring house values at \$14,531, or \$17,600 in 2021 dollars, based on research from 2008 or earlier. Combined, the HUD figures suggest a benefit of at least \$30,100, which the Bureau believes is likely an underestimate of the average benefit to preventing foreclosure.<sup>142</sup>

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>143</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 certain communities. For example, Black and Hispanic homeowners were more than two times as likely to be behind on housing payments as of December 2020.<sup>144</sup> Black and Hispanic borrowers were also two times as likely to be in forbearance compared to White borrowers as of March 2021.<sup>145</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 provision; in other words, the difference in the total foreclosures between what would occur under the baseline and what would occur under the special procedural

*Foreclosure Externalities: New Evidence*, 87. J. of Urban Econ. 42 (2015), <https://www.sciencedirect.com/science/article/pii/S0094119015000170>.

<sup>142</sup> Based on comments received by the Bureau on the May 2021 Notice of Proposed Rulemaking, commenters suggested that the significant costs of foreclosure for borrowers include the non-monetary cost to borrowers and the cost to communities. As such, the Bureau will focus on the combined value of \$30,100 rather than only the direct costs of avoiding foreclosure as was used in the April 2021 Notice of Proposed Rulemaking.

<sup>143</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>.

<sup>144</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>145</sup> See CFPB Mortgage Borrower Pandemic Report, *supra* note 5.

safeguards provision. 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 final rule, which is August 31, 2021, or that will become 120 days delinquent between the effective date and the end of the period during which the special procedural safeguards will apply, on or after January 1, 2022. 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 provision.

As of April 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>146</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 final rule's effective date. One publicly available estimate based on current trends is that 900,000 loans will reach terminal expirations starting in the fall of 2021.<sup>147</sup> Many of the loans currently delinquent 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 effective date, a reasonable approach is to consider a range with respect to the share of loans that will reach terminal expirations starting in September of 2021 and through the remainder of the year. For purposes of quantifying a potential range of benefits to consumers, the discussion below assumes that as of August 31, 2021, all of loans reaching terminal expiration in the fall will be considered 120 days 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 true 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 on average. Estimates from April 2021 show that the number of loans in forbearance programs (2.2 million) is significantly larger than the number of borrowers who are seriously delinquent and with loans that are not in a forbearance program (191,000).<sup>148</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.

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>149</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>150</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>151</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 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 April 2021 will be

more than 120 days delinquent as of August 31, 2021, and unable to resolve their delinquency 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 rule.<sup>152</sup> Next, the Bureau excludes 14 percent of these loans, reflecting an estimate of the share of loans serviced by small servicers to which the rule would not apply.<sup>153</sup> This leaves between roughly 620,000 and 1.2 million loans at risk of an initial filing of foreclosure to which the final 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>154</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>155</sup> Overall, this gives a baseline estimate of loans that will experience

<sup>152</sup> An alternative to providing a range of estimates is to forecast an expected number of loans that will exit forbearance after the effective date of the rule and be more than 120 days delinquent and unable to resolve the delinquency. Forecasting a specific value for a future period requires making significant assumptions due to the uncertainty associated with predicting future outcomes. In order to account for this uncertainty, standard econometric and statistical forecasting models also report standard errors or confidence bands around the estimates, effectively providing a range of plausible estimates given the uncertainty in future outcomes. Absent formal forecasting models, the Bureau believes it is reasonable to rely on a range of plausible estimates rather than making significant assumptions to pinpoint a single estimate, which may be less reliable.

<sup>153</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>154</sup> 2013 RESPA Servicing Rule Assessment Report, *supra* note 11, at 48.

<sup>155</sup> A large share of foreclosures is 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 2013 RESPA Servicing Rule Assessment Report, *supra* note 11, at 52–53.

<sup>146</sup> See Black Apr. 2021 Report, *supra* note 7.

<sup>147</sup> *Id.* Black Knight's estimates require significant assumptions due to the uncertainty in how forbearance will evolve in future periods. In particular, Black Knight assumes that borrowers exit forbearance at a rate of 3 percent per month until the end of 2021. The Bureau believes there is significant uncertainty in the rate at which borrowers will exit forbearance during the remainder of the year and, therefore, the extent to which this assumption will hold. Black Knight does not provide alternative estimates under different assumptions or a range of plausible outcomes.

<sup>148</sup> See Black Apr. 2021 Report, *supra* note 7. It is possible for a borrower to be delinquent for purposes of Regulation X during a forbearance program. See *supra* note 62 and accompanying text.

<sup>149</sup> See 2013 RESPA Servicing Rule Assessment Report, *supra* note 11.

<sup>150</sup> *Id.* at 69–70.

<sup>151</sup> *Id.* at 48.



foreclosure sale of between roughly 125,000 and 250,000.

The next step is to estimate how the number of foreclosures would change under the final rule. The final rule is effective on August 31, 2021 and requires servicers to comply with special procedural safeguards until January 1, 2022, delaying any foreclosure proceedings for certain loans until after that date. The Bureau assumes each loan will experience a four-month delay in the point at which servicers can initiate foreclosure for borrowers with loans that exit forbearance and are more than 120 days delinquent and cannot resolve the delinquency upon exiting forbearance between the effective date of the final rule and the end of the period during which special procedural safeguards will apply.<sup>156</sup> 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 final rule.<sup>157</sup> Similarly, if servicers would not immediately initiate foreclosure proceedings with the borrowers absent the rule as some commenters indicated, then the delay period as a result of the rule would be shorter and the number of foreclosures prevented would be reduced.<sup>158</sup>

<sup>156</sup> The Bureau believes there is significant uncertainty in the average length of delay for affected loans. The average delay could be shorter if a significant share of loans exit forbearance between October and December 2021 and servicers are generally able to initiate foreclosure upon termination of the period during which special procedural safeguards will apply on January 1, 2022. On the other hand, if the rule indirectly causes a delay in servicers' ability to initiate foreclosure after January 1, 2022, then loans that exit forbearance between October and December 2021 may experience delays that extend beyond the termination of the period during which special procedural safeguards will apply. The average benefits to consumers will be overestimated if the average delay is shorter and will be underestimated if the average delay is longer.

<sup>157</sup> An extension of forbearance programs or foreclosure moratoria would reduce the total number of months delay under the 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 January 1, 2022. 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>158</sup> If servicers delay initiating foreclosure, then the total number of foreclosures prevented under the 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

Estimating how many foreclosures might be prevented by a four-month delay requires making strong assumptions about the additional growth in the share of recovered loans over the additional four-month period, where recovered is defined as a self-cure, pre-payment, 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 who have missed payments because of a forbearance plan may not be required to repay those missed payments immediately. Any of these differences across borrowers can significantly affect the growth in the share of recovered loans over time.

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>159</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

limited information on what the economic circumstances and financial status of borrowers will be at that time.

<sup>159</sup> See 2013 RESPA Servicing Rule Assessment Report, *supra* note 11, 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>.

than one percent per month during the second year.<sup>160</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 special procedural safeguard requirements would provide certain borrowers additional time during which servicers cannot initiate foreclosure, unless the special procedural safeguards have been met. For these borrowers, the special procedural safeguards 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 this additional time makes in a borrower's 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 special procedural safeguards provision will not change the course of recovery for all borrowers who exit forbearance and are at least 120 days delinquent as of the effective date of the rule. In particular, it will not affect the likelihood of foreclosure for loans to which the special procedural safeguards do not apply or for loans for which the special procedural safeguards have been met. The Bureau believes the special procedural safeguards will directly affect the course of recovery for the remaining group of borrowers who are more likely to be in contact with their servicer and are experiencing financial difficulty as a direct result of the current economic crisis. This group of borrowers is expected to have a higher likelihood of recovery as a result of the additional time for meaningful review generated by the special procedural safeguards provision.

The Bureau does not know exactly how many borrowers exist for whom the special procedural safeguard requirements will not apply or for

<sup>160</sup> The rate of change in borrowers who have recovered is calculated as:  $[(85 \text{ percent} - 80 \text{ percent}) \div 80 \text{ percent}] \times 100 = 6 \text{ percent}$ . 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).

whom the procedural safeguards may be met, and therefore would have similar outcomes both under the baseline and under the final rule. Publicly available estimates report that roughly 19 percent of borrowers in forbearance as of March 2021 were 30+ days delinquent in February of 2020. Given the special procedural safeguard requirements, the share of borrowers that were 120+ days delinquent in March 2020 is likely a smaller share of borrowers in forbearance. There are no publicly available numbers on the share of loans in forbearance that correspond to abandoned properties<sup>161</sup> or the share of unresponsive borrowers. Assuming some overlap between these three groups, the Bureau believes that 25 percent is a reasonable estimate of the share of borrowers for whom the special procedural safeguard requirements will not apply or for whom the servicer may exercise the special procedural safeguards, and who therefore will not experience a change in their course of recovery resulting from the special procedural safeguards provision. This implies that 75 percent of borrowers with terminal expirations between September 2021 and the end of the year will be directly affected as a result of the special procedural safeguard requirements and may experience a course of recovery different than they otherwise would have absent the special procedural safeguard provision.

For purposes of estimating a plausible range of potential benefits of the final rule, suppose that, for borrowers who are afforded additional time before foreclosure can be initiated as a result of the rule, the increase in the number of borrowers who are ultimately able to recover as a result of the delay is 0.55 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.<sup>162</sup> Assuming an average four-

month delay, the additional share of loans that recover could then be estimated at about 2.2 percent of the initial group of delinquent loans.<sup>163</sup> The remaining distribution of outcomes (foreclosure, prepay, and delinquent without loan modification) are estimated based on a constant relative share across groups.<sup>164</sup> This means that 7.8 percent of delinquent loans will end with a foreclosure sale within 18 months. Similar to under the baseline, the Bureau 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 11.7 percent of delinquent loans would end with a foreclosure sale). Applying this to the assumed 75 percent of loans that would be directly affected by the special procedural safeguard requirements generates an estimate of foreclosure sales under the rule for this set of loans of between roughly 91,000 and 182,000. Comparing this to baseline foreclosures for this group of loans, the special procedural safeguards would lead to approximately 2,500 and 5,000 fewer foreclosures compared to the baseline.

The Bureau believes that an assumed increase in the likelihood of recovery of

more likely to recover from delinquency. This means the rate of recovery should be higher for this group compared to the average borrower. If the additional rate of recovery compared to the average borrower was smaller (e.g., 0.525 percent or a 5 percent increase compared to the average) then the number of prevented foreclosures would decrease. If the additional rate of recovery was larger (e.g., 0.6 percent or a 20 percent increase compared to the average), then the number of prevented foreclosures would increase.

<sup>163</sup> The extent of the delay depends on when a loan exits forbearance and the specifics of how the special procedural safeguards delay initiation of foreclosure. If the exact number of loans experiencing a delay of a certain number of months was known, then one could multiply the number of loans exiting forbearance each month by the month-adjusted expected recovery rate. Then, the number of recovered loans can be calculated by summing across months.

<sup>164</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 2013 RESPA Servicing Rule Assessment Report, *supra* note 11, 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.

2.2 percent may significantly overestimate or underestimate the actual effect of the 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.

Finally, an estimate of a plausible range of the potential total benefit to borrowers of avoiding foreclosure sales as a result of the provision can be calculated by taking the difference in the number of foreclosure sales under the baseline compared to under the final rule and multiplying that difference by the per-borrower cost of foreclosure. Based on a per foreclosure cost to the borrower of \$30,100, the benefit to borrowers of avoiding foreclosure under the rule is estimated at between \$75 million and \$151 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 per-borrower benefit 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 will benefit from the 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 special procedural safeguards provision could mean that some borrowers who would have cured their delinquency after foreclosure is initiated are instead able to cure their

<sup>161</sup> Publicly available information from ATTOM Data Solutions' reports that, of the roughly 216,000 homes currently in the foreclosure process, roughly 7,960 or 3.7 percent are abandoned as of the third quarter of 2021. It is unclear how to generalize this information to the group of borrowers that remain in forbearance. 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>162</sup> The average monthly rate of recovery is 10 percent higher than the rate of recovery used in the Bureau's Notice of Proposed Rulemaking, which used an average monthly recovery rate of 0.5 percent. As described, the Bureau believes the group of borrowers for whom the special procedural safeguards would delay foreclosure are relatively

delinquency before foreclosure is initiated, meaning that they are able to avoid such foreclosure-related costs. Preventing the initiation of foreclosure also may have longer-term benefits. For example, foreclosure initiation may make future access to both mortgage and nonmortgage credit more difficult if the foreclosure initiation is reported on the consumer's credit report. The Bureau does not have data that would permit it to estimate the extent of this benefit of the final rule, which would likely vary according to State foreclosure laws and the borrower's specific situation.

In addition, there may be significant indirect effects of additional time to enter into loss mitigation given recent policy changes affecting distressed borrowers.<sup>165</sup> For example, the U.S. Treasury Department (Treasury) is administering the Homeowner Assistance Fund (HAF), which was established under section 3206 of the American Rescue Plan Act of 2021 (the ARP).<sup>166</sup> The purpose of HAF is to prevent mortgage delinquencies and defaults, foreclosures, loss of utilities or home energy services, and displacement of homeowners experiencing financial hardship after January 21, 2020.<sup>167</sup> Funds from the HAF may be used for assistance with mortgage payments, homeowner's insurance, utility payments, and other specified purposes. Treasury is expected to distribute the majority of HAF funds to the States after June 30, 2021, with most funds available by the end of the year. Any delays in foreclosure initiation resulting from the special loss mitigation procedural safeguards provision may enable borrowers to take advantage of HAF funds when they begin to be distributed. In particular, the additional time available to certain borrowers may enable them to avoid foreclosure by offering additional time to gain access to HAF assistance. The Bureau does not have data that would permit it to estimate the extent of this benefit of the final rule.

The 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. In order to quantify this effect, the Bureau would need data on how often borrowers who are delinquent and have not yet taken steps to engage with their servicer about resolving their delinquency decide to initiate such steps *because* they receive a foreclosure notice. The Bureau does not have such data that would permit it to estimate the extent of this cost of the rule. However, the Bureau anticipates that the provision of the rule permitting foreclosures to proceed when borrowers are unresponsive will mitigate any such costs, by permitting some foreclosures to be initiated when borrowers choose not to engage with their servicers.

*Benefits and costs to covered persons.* The provision will impose new costs on servicers and investors by delaying the date at which foreclosure can be initiated for loans subject to the special procedural safeguard requirements but where the special procedural safeguards are not met, which will prolong the ongoing costs of servicing these nonperforming loans and delay the point at which servicers are able to complete the foreclosure and sell the property. These costs apply to foreclosures that the rule does 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. However, as also discussed above, past experience and the large number of loans currently in a nonpayment status suggest that as many as 91,000 and 182,000 loans of the loans that could be subject to delay as a result of the special procedural safeguard requirements could ultimately end in foreclosure. An additional number of these loans are likely to enter the foreclosure process but not end in foreclosure because the borrower is able to recover or prepay the loan either through refinancing or selling the home.

By preventing servicers from initiating foreclosure for loans that

would be subject to the special procedural safeguard requirements and where the special procedural safeguards are not met before January 1, 2022, the rule could delay many foreclosures from being initiated by up to four months for this group of borrowers. 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>168</sup> For borrowers in this group where foreclosures 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>169</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

<sup>165</sup> While the Bureau considers this potential benefit for purposes of sec. 1022(b)(2)(A), it does not rely on these potential benefits to finalize the rule's regulatory interventions under RESPA or the Dodd-Frank Act.

<sup>166</sup> American Rescue Plan Act of 2021, Public Law 117-2, 135 Stat. 4 (2021).

<sup>167</sup> U.S. Dep't of the Treasury, *Homeowner Assistance Fund Guidance* at 1 (Apr. 14, 2021), <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/homeowner-assistance-fund>.

<sup>168</sup> Even absent the special procedural safeguards, 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>169</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>.

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. For loans subject to the special procedural safeguards but where the special procedural safeguards are not met, the provision will 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 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>170</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.

In addition, as discussed above, the provision may delay some borrowers' 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. If this causes some borrowers to resolve their delinquencies later than they would have under the baseline, the

servicer may incur additional costs of servicing non-performing loans during the period before those consumers resolve their delinquencies. Such additional costs would be qualitatively similar to the additional costs associated with a delay in foreclosure sales.

Servicers would also incur costs to ensure the provision is not violated. The relative simplicity of the provision may mean the direct cost of developing systems to ensure compliance is not too great. However, servicers that meet procedural safeguard requirements and seek to pursue foreclosure (for example, when a borrower is unresponsive) will incur additional costs to ensure that the procedural safeguard requirements are in fact met so that they do not inadvertently violate the provision.

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 certain 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 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 on or after January 1, 2022, the rule will cause servicers to delay foreclosure in some cases even when they perceive the net benefit of doing so to be 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.

#### Alternative Approach: Special Pre-Foreclosure Review Period

In the proposed rule, the Bureau proposed an alternative in which servicers would not be allowed to initiate the foreclosure process for any loans during a special pre-foreclosure

review period that would have taken place between the effective date of the rule and December 31, 2021.

Such an alternative could provide larger benefits for certain borrowers whose loans are more than 120 days delinquent and either not eligible for the special procedural safeguards or loans where the procedural safeguards are met. In general, the benefits of a pre-foreclosure review period would be lower for borrowers whose loans are not affected by the procedural safeguard requirements. For example, if the servicer has already determined a borrower is not eligible for any loss mitigation options the borrower would be less likely to obtain a loss mitigation option even if afforded additional time. However, the alternative could permit some borrowers to benefit from the additional time for loss mitigation review 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 circumstances mean the alternative would provide significant benefits.

Similarly, the benefits of the alternative approach 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 the time required by the final rule but who would benefit from the additional time to be considered for loss mitigation options if they were to contact their servicer later in the pre-foreclosure review period. The Bureau is not aware of data that could reasonably quantify the number of borrowers who meet the final rule's criteria for unresponsiveness and, of those, the number for whom such an additional time before foreclosure could be initiated would meaningfully increase their benefits from the rule. Similarly, the Bureau is not aware of data that could reasonably quantify the number of borrowers for whom the final rule might provide a greater benefit than the alternative because permitting a first

<sup>170</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 44, at 7.

notice or filing for foreclosure may prompt them to engage with their servicer regarding loss mitigation options.

This alternative approach would generally impose greater costs on servicers than the final rule because it would delay the initiation of foreclosure for a larger number of loans. If servicers were unable to initiate the foreclosure process for any loans until after December 31, 2021, more loans would experience a delay of the overall foreclosure timeline. The loans that would not be affected by the final rule's procedural safeguard requirements may be loans that are particularly likely to move to foreclosure, so may be the loans for which the cost of preventing an earlier initiation of foreclosure is greatest. The extent of such costs 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 alternative's pre-foreclosure review period would not have increased the likelihood of finding a loss mitigation option.

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

The Bureau considered an alternative to the special procedural safeguard requirements 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 final 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 rule, this alternative approach would provide a longer period than in the rule during which the borrower would be protected from the initiation of foreclosure. For example, a borrower whose forbearance ends on November 30, 2021 and whose loan is subject to the special procedural safeguard requirements would be protected from initiation of foreclosure for approximately one month under the final 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 final rule, 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 final rule, 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 final rule 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 final rule, which would apply to all covered loans until a certain date. The Bureau does not have data to estimate such additional costs relative to the final rule.

#### 2. Evaluation of Loss Mitigation Applications

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

mitigation application to certain streamlined loan modifications made available to borrowers experiencing 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 § 1024.41(c)(2)(vi), for any loss mitigation application the borrower submitted before that offer, a servicer is no longer required to comply with § 1024.41(b)(1)'s requirements regarding reasonable diligence to collect a complete loss mitigation application, and a servicer also is no longer required to comply with § 1024.41(b)(2)'s evaluation and notice requirements. If the borrower fails to perform under a trial loan modification plan offered pursuant to § 1024.41(c)(2)(vi)(A) or if the borrower requests further assistance, a servicer must 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, and must send the notice required under § 1024.41(b)(2) with regard to the most recent loss mitigation application the borrower submitted prior to the offer the servicer made under the exception, unless the servicer has already sent that notice.

*Benefits and costs to consumers.* The exception will 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 provision could enable borrowers to obtain a loan modification in the first place.<sup>171</sup> For some borrowers, a loan modification may be their only opportunity to

<sup>171</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. Section 1024.41(c)(2)(ii). By providing additional conditions under which servicers may offer certain loss mitigation options based on an incomplete application, the final rule may increase the likelihood that a borrower is able to qualify for a loss mitigation option after submitting an incomplete application.

become or remain current and avoid foreclosure. Thus, for some borrowers who obtain a loan modification under the exception, the benefit of the provision is 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, an estimated 2.2 million borrowers had mortgage loans that were in a forbearance program as of April 2021. Of these, an estimated 14 percent are serviced by small servicers, leaving approximately 1.9 million whose servicers are covered by the rule. Many of these borrowers may recover before the 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 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 as many as 760,000 borrowers exiting their forbearance programs after 18 months of forbearance payments in September and October of 2021.<sup>172</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>173</sup> This might lead

<sup>172</sup> Black Apr. 2021 Report, *supra* note 7, 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 roughly 650,000 loans subject to the final rule would exit forbearance in these months.

<sup>173</sup> Servicers have reported challenges in customer-facing staff capacity during the pandemic.

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 exception.

The provision may 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 § 1024.41(c)(2)(vi) could 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 rule a borrower who receives a streamlined loan modification after evaluation of an incomplete application will 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.

*Benefits and costs to covered persons.* Servicers will 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

See Caroline Patane, *Servicers report biggest challenges implementing COVID-19 assistance programs*, Fed. Nat'l Mortg. Ass'n, Perspectives Blog (Jan. 12, 2021), <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.

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 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>174</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 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 provision will reduce this strain and may thereby reduce overall servicing costs.

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

<sup>174</sup> 2013 RESPA Servicing Rule Assessment Report, *supra* note 11, at 155-156.

### 3. Live Contact and Reasonable Diligence Requirements

Section 1024.39(e) temporarily requires servicers to provide additional information to certain borrowers during live contacts established under existing requirements. In general, for borrowers that are not in forbearance at the time live contact is established, if the owner or assignee of the borrower's mortgage loan makes a forbearance program available to borrowers experiencing a COVID-19-related hardship, § 1024.39(e)(1) requires servicers to inform the borrower that forbearance programs are available for borrowers experiencing such a hardship. Unless the borrower states they are not interested, the servicer must list and briefly describe available forbearance programs to those borrowers and the actions a borrower must take to be evaluated. Additionally, the servicer must identify at least one way the borrower can find contact information for homeownership counseling services. In general, proposed § 1024.39(e)(2) requires that, for borrowers who are in a forbearance program made available to those experiencing a COVID-19-related hardship 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 required live contact that occurs at least 10 days but no more than 45 days before the scheduled end of the forbearance period. Servicers must also identify at least one way the borrower can find contact information for homeownership counseling services. The rule does 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 § 1024.39(e)(2), the final rule adds 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.* Section 1024.39(e)(1) will 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>175</sup> Similarly, § 1024.39(e)(2), together with comment 41(b)1-4.iv, will 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 provisions, the extent of the benefit depends to a large degree on whether servicers are already taking the actions required by the applicable 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 contact communications.<sup>176</sup>

<sup>175</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>.

<sup>176</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

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 will benefit from the provision. As discussed above, an estimated 2.2 million borrowers were in forbearance programs as of April 2021 and an estimated 191,000 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 provision also depend on the extent to which servicers are already taking the actions required by the provision. Servicers that do not currently take these actions will need to revise call scripts and make similar changes to their procedures when conducting live contact communications.<sup>177</sup> Even servicers that do currently take actions that comply with the provisions will likely incur one-time costs to review policies and procedures and potentially make changes to ensure compliance with the rule. 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, will tend to make any changes more costly.<sup>178</sup>

benefits, and incurring many of the costs, that would otherwise be generated by the provision.

<sup>177</sup> Servicers should already have access to the information they would need to provide under the 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>178</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 Caroline Patane, *Servicers report biggest challenges implementing COVID-19 assistance programs*, Fed. Nat'l Mortg. Ass'n, Perspectives Blog (Jan. 12, 2021), <https://www.fanniemae.com/research-and-insights/perspectives/servicers-report-biggest-challenges-implementing-covid-19-assistance-programs>.



### E. Potential Specific Impacts of the 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>179</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 are exempt from the rule and are therefore not be directly affected by the rule.

With respect to servicers that are not small servicers but are depository institutions with \$10 billion or less in total assets, the Bureau believes that the consideration of benefits and costs of covered persons presented above generally describes the impacts of the 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 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 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 rule will 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 January 1, 2022. The exemption of small servicers from the rule will help maintain consumer access to credit through these providers.

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

Consumers in rural areas may experience benefits from the 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 are exempt from the rule, although they may already provide most of the benefits to consumers that the rule is designed to provide.

### VIII. Final 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>180</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>181</sup> The Bureau certified that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.<sup>182</sup>

Consistent with the proposed rule, the final rule does 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 are therefore not directly affected by the 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>183</sup> Therefore, the Bureau has concluded that the final rule will not have an effect on a substantial number of small entities.

Accordingly, the Acting Director hereby certifies that this final rule will 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.

### IX. 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 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 final 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](mailto:CFPB_Public_PRA@cfpb.gov).

### X. Congressional Review Act

Pursuant to the Congressional Review Act,<sup>184</sup> the Bureau will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States at least 60 days prior to the rule’s

<sup>183</sup> 2013 RESPA Servicing Final Rule, *supra* note 11, 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>.

<sup>184</sup> 5 U.S.C. 801 *et seq.*

<sup>180</sup> 5 U.S.C. 601 *et seq.*

<sup>181</sup> 5 U.S.C. 609.

<sup>182</sup> 86 FR 18840, 18877 (Apr. 9, 2021).

<sup>179</sup> 81 FR 72160 (Oct. 19, 2016).

published effective date. The Office of Information and Regulatory Affairs has designated this rule as a “major rule” as defined by 5 U.S.C. 804(2).

**XI. 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.

**XII. Authority and Issuance**

For the reasons set forth in the preamble, the Bureau amends 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 national emergency for the COVID–19 pandemic declared in Proclamation 9994 on March 13, 2020 (beginning on March 1, 2020) and continued on February 24, 2021, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C.1622(d)).

\* \* \* \* \*

■ 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 (e) of this section, if applicable.

\* \* \* \* \*

(e) *Temporary COVID–19-Related Live Contact.* Until October 1, 2022, in complying with the requirements described in paragraph (a) of this section, 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.* At the time the servicer establishes live contact pursuant to paragraph (a) of this section, if the borrower is not in a forbearance program 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 shall inform the borrower of the following information:

(i) That forbearance programs are available for borrowers experiencing a COVID–19-related hardship and, unless the borrower states that they are not interested in receiving information about such programs, the servicer shall list and briefly describe to the borrower any such forbearance programs made available at that time and the actions the borrower must take to be evaluated for such forbearance programs.

(ii) At least one way that the borrower can find contact information for homeownership counseling services, such as referencing the borrower’s periodic statement.

(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 live contact established pursuant to paragraph (a) of this section that occurs at least 10 days and no more than 45 days before the scheduled end of the forbearance program or, if the scheduled end date of the forbearance program occurs between August 31, 2021 and September 10, 2021, during the first live contact made pursuant paragraph (a) of this section after August 31, 2021, the servicer shall inform the borrower of the following information:

(i) The date the borrower’s current forbearance program is scheduled to end;

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

(iii) At least one way that the borrower can find contact information for homeownership counseling services,

such as referencing the borrower’s periodic statement.

- 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); and
  - c. 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, for the entire modified term, does not cause the borrower's monthly required principal and interest payment to increase beyond the monthly principal and interest payment required prior to the loan modification.

(2) If the loan modification permits the borrower to delay paying certain amounts until the mortgage loan is refinanced, the mortgaged property is sold, the loan modification matures, or, for a mortgage loan insured by the Federal Housing Administration, the mortgage insurance terminates, those amounts do not accrue interest.

(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 this paragraph (c)(2)(vi)(A) ends any preexisting delinquency on the mortgage loan or the loan modification offered pursuant to this paragraph (c)(2)(vi)(A) 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.

(5) 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 that were incurred on or after March 1, 2020, promptly upon the borrower's acceptance of the 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 and must provide the borrower with the notice required by paragraph (b)(2)(i)(B) of this section with regard to the most recent 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,

unless the servicer has already provided such notice to the borrower.

\* \* \* \* \*

(f) \* \* \*

(3) *Temporary Special COVID-19 Loss Mitigation Procedural Safeguards.* (i) *In general.* To give a borrower a meaningful opportunity to pursue loss mitigation options, a servicer must ensure that one of the procedural safeguards described in paragraph (f)(3)(ii) of this section has been met before making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process because of a delinquency under paragraph (f)(1)(i) if:

(A) The borrower's mortgage loan obligation became more than 120 days delinquent on or after March 1, 2020; and

(B) The statute of limitations applicable to the foreclosure action being taken in the laws of the State where the property securing the mortgage loan is located expires on or after January 1, 2022.

(ii) *Procedural safeguards.* A procedural safeguard is met if:

(A) *Complete loss mitigation application evaluated.* The borrower submitted a complete loss mitigation application, remained delinquent at all times since submitting the application, and paragraph (f)(2) of this section permitted the servicer to make the first notice or filing required for foreclosure;

(B) *Abandoned property.* The property securing the mortgage loan is abandoned according to the laws of the State or municipality where the property is located when the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process; or

(C) *Unresponsive borrower.* The servicer did not receive any communications from the borrower for at least 90 days before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and all of the following conditions are met:

(1) The servicer made good faith efforts to establish live contact with the borrower after each payment due date, as required by § 1024.39(a), during the 90-day period before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process;

(2) The servicer sent the written notice required by § 1024.39(b) at least 10 days and no more than 45 days before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process;

(3) The servicer sent all notices required by this section, as applicable, during the 90-day period before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process; and

(4) The borrower's forbearance program, if applicable, ended at least 30 days before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process.

(iii) *Sunset date.* This paragraph (f)(3) does not apply if a servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process on or after January 1, 2022.

\* \* \* \* \*

■ 5. In Supplement I to Part 1024:

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

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

■ c. Under § 1024.41—*Loss mitigation procedures, after 41(f) Prohibition on Foreclosure Referral*, add paragraphs 41(f)(3) Temporary Special COVID-19 Loss Mitigation Procedural Safeguards and 41(f)(3)(ii)(C) Unresponsive borrower.

The revisions and addition 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. However, if a borrower is in a situation such that the additional live contact information is required under § 1024.39(e) or if a servicer relies on the temporary special COVID–19 loss mitigation procedural safeguards provision in § 1024.41(f)(3)(ii)(C)(1), providing no more than a sentence requesting that the borrower contact the servicer with regard to the delinquencies in the periodic statement or in an electronic communication would not be a reasonable step, under the circumstances, to make good faith efforts to establish live contact. 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. When the borrower is in a forbearance program made available to borrowers experiencing a COVID–19-related hardship such that the additional live contact information is required under § 1024.39(e)(2) or if a servicer relies on the temporary special COVID–19 loss mitigation procedural safeguards provision in § 1024.41(f)(3)(ii)(C)(1), the servicer is not maintaining ongoing contact with the borrower under the loss mitigation procedures under § 1024.41 in a way that would comply with § 1024.39(a) if the servicer has only sent the notices required by § 1024.41(b)(2)(i)(B) and (c)(2)(iii) and has had no further ongoing contact with the borrower concerning the borrower's loss mitigation application. A servicer must resume compliance with the requirements of § 1024.39(a) for a borrower who becomes delinquent again after curing a prior delinquency.

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§ 1024.41—Loss Mitigation Procedures

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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, and the borrower remains delinquent, a servicer must contact the borrower no later than 30 days before the scheduled 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.

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#### 41(f)(3) Temporary Special COVID-19 Loss Mitigation Procedural Safeguards

1. *Record retention.* As required by § 1024.38(c)(1), a servicer shall maintain records that document actions taken with respect to a borrower's mortgage loan account until one year after the date a mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer. If the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process before January 1, 2022, these records must include evidence demonstrating compliance with § 1024.41(f)(3), including, if applicable, evidence that the servicer satisfied one of the procedural safeguards described in § 1024.41(3)(ii). For example, if the procedural safeguards are met due to an unresponsive borrower determination as described in § 1024.41(f)(3)(ii)(C), the servicer must maintain records demonstrating that the servicer did not receive communications from the borrower during the relevant time period and that all four elements of § 1024.41(f)(3)(ii)(C) were met. For example, records demonstrating that the servicer did not receive any communications from the borrower during any relevant time period may include, for example: (1) Call logs, servicing notes, and other systems of record cataloguing communications showing the absence of written or oral communication from the borrower during the relevant period; and (2) a schedule of all transactions credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account, as required by § 1024.38(c)(2)(i). The method of retaining these records must comply with comment 31(c)(1)-1.

#### 41(f)(3)(ii)(C) Unresponsive Borrower

1. *Communication.* For purposes of § 1024.41(f)(3)(ii)(C), a servicer has not received a communication from the borrower if the servicer has not received any written or electronic communication from the borrower about the mortgage loan obligation, has not received a telephone call from the borrower about the mortgage loan obligation, has not successfully established live contact with the borrower about the mortgage loan obligation, and has not received a payment on the mortgage loan obligation. A servicer

has received a communication from the borrower if, for example, the borrower discusses loss mitigation options with the servicer, even if the borrower does not submit a loss mitigation application or agree to a loss mitigation option offered by the servicer.

2. *Borrower's representative.* A servicer has received a communication from the borrower if the communication is from an agent of the

borrower. 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 that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. Upon receipt of such documentation, the

servicer shall treat the communication as having been submitted by the borrower.

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Dated: June 25, 2021.

**David Uejio,**

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Financial Protection.*

[FR Doc. 2021-13964 Filed 6-29-21; 8:45 am]

**BILLING CODE 4810-AM-P**