

MORTGAGE ORIGINATION AND SERVICING RULES

Common Challenges, Pitfalls and Solutions

PRESENTED BY:

Laura Hobson Brown
McGlinchey Stafford
New Orleans, Louisiana

Lauren E. Campisi
McGlinchey Stafford
New Orleans, Louisiana

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LOAN MORTGAGE ORIGINATION

ABILITY TO REPAY (“ATR”) RULES

Dodd-Frank Act amended the Truth in Lending Act (“TILA”) to require a creditor evaluating a consumer residential mortgage loan application to make a reasonable, good-faith determination that the applicant has a reasonable ability to repay (“ATR”) the requested loan in accordance with its terms. 15 U.S.C. § 1639c.

This TILA amendment, implemented as part of Regulation Z, at 12 C.F.R. § 1026.43, was effective for applications received on or after January 1, 2014.

ATR RULES (cont'd.)

Scope: ATR Rules cover origination or refinancing of any closed-end loan secured by a dwelling, including the real estate attached to the dwelling

- Exclusions:

- HELOCS
- Time-share plans
- Reverse mortgages
- Temporary or bridge loans for 12 months or less (subject to renewal)
- Construction phase of 12 months or less (with possible renewal) of a C-to-P loan
- Consumer loan secured by vacant land

ATR RULES (cont'd.)

- Loan modification that is not “refinancing” or “assumption” for Regulation Z purposes (12 C.F.R. § 1026.19(a), (b)) does not trigger ATR Rule.
 - CFPB recently confirmed this with respect to successors-in-interest
 - ❖ Heir that first has ownership interest in property and then agrees to pay debt that property secures is not “assumption” under Regulation Z definition and does not trigger ATR Rules

ATR RULES (cont'd.)

ATR Underwriting Factors (12 C.F.R. § 1026.43(c)(2);

Comment 43(c)(2)-4)):

- Creditor must determine, based on documented and verified information, that applicant has ability to repay loan;
- Creditor must consider and verify 8 factors regarding the applicant in determining his repayment ability:
 - (1) Income or assets, excluding the value of the collateral property;
 - (2) Current employment status;
 - (3) Monthly payment on covered loan (if granted);

ATR RULES (cont'd.)

- (4) Monthly payment on any *simultaneous loan* that would be secured by the same property as covered loan;
- (5) Monthly payment for mortgage-related obligations (property taxes and insurance);
- (6) Current debt obligations, alimony and child support;
- (7) Monthly debt-to-income (“DTI”) ratio or residual income must be considered
 - No specific DTI threshold or residual income standard is specified for ATR determination;
- (8) Credit history.

Regulation Z § 1026.43 provides specific guidance regarding how to apply these 8 factors.

ATR RULES (cont'd.)

Policies and Procedures: Ensure that your underwriting policies incorporate consideration of these 8 factors, and that your procedures reflect that each factor is always considered

- Document *how* you considered these factors; it may prove helpful in defending a future TILA ATR claim (although this is not legally required)

Document Verification: Creditor must use reasonably reliable third party records to determine ATR.

- Regulation Z § 1043 lists acceptable records
- Keep copies of records used in underwriting (electronic is OK).

ATR RULES (cont'd.)

Is That All?

ATR Rule does not require applicant to:

- Have minimum credit score, or
- Make specific downpayment to purchase home

ATR Rule does not specify how creditor must use the 8 factors in underwriting loan; creditor must develop and apply its own underwriting standards.

12 C.F.R. § 1026.43(c)(1).

ATR RULES (cont'd.)

Self-Assessment: Are your underwriting procedures adequately measuring ATR?

— CFPB examples:

- Your ATR determination is likely **reasonable** and **in good faith** if:
 - Your underwriting standards have historically produced low delinquencies and defaults during uncertain economic times
 - Your borrower made a significant number of timely payments post-origination or after reset of ARM loan

ATR RULES (cont'd.)

- Your procedures for determining ATR may **NOT** be adequate if:
 - You ignored indications that your underwriting criteria were ineffective in determining an applicant's ATR
 - You applied underwriting standards inconsistently without reasonable justification
 - Your borrowers frequently defaults on first payment or early in loan term, without experiencing significant personal misfortune

ATR RULES (cont'd.)

What's The Big Deal About the ATR Rule?

- Special additional remedies are available to consumer for ATR violation, increasing potential liability of creditor and its assignee (15 U.S.C. § 1640).

Affirmative Consumer Action: Increased Damages, Statute of Limitations

- *Special statutory damages* (action brought within 3 years): all finance charges and fees paid by consumer (15 U.S.C. §§ 1640(a)(4); (e)).
- *Actual damages* (action brought within 1 year) (15 U.S.C. § 1640(a)(1)).

ATR RULES (cont'd.)

- *Standard statutory damages* (action brought within 1 year) (15 U.S.C. § 1640(a)(2)(A)).
 - Individual action: \$400 - \$4,000 (15 U.S.C. §§ 1640(a)(2)(A)).
 - Class action: lesser of \$1,000,000 or 1% of creditor's net worth (15 U.S.C. §§ 1640(a)(2)(B)).
- Court costs and attorneys' fees (15 U.S.C. §§ 1640(a)(3)).

ATR RULES (cont'd.)

Affirmative Foreclosure Defense:

- If creditor or its assignee forecloses, consumer may defend by alleging a TILA ATR violation; any damages awarded reduce amount of consumer's secured debt (15 U.S.C. §§ 1640(k)).
 - No time limit on use of this defense
 - For special statutory damages, consumer's setoff amount is limited to amount of finance charges and fees he paid during loan's first 3 years.

ATR RULES (cont'd.)

- Implications of this Affirmative Defense:
 - 1) Creditor (assignee), not consumer, controls use of this defense; it is only triggered when creditor (assignee) foreclosures or sues to collect the debt;
 - 2) Consumer can use defense to reduce his debt by the amount of damages he receives, but he receives no direct compensation; he can slow down but cannot prevent foreclosure based on TILA ATR defense claim.

CFPB Enforcement Action: CFPB or other regulator could seek CMP and/ or injunction against lender for violating TILA ATR Rules

QUALIFIED MORTGAGE (“QM”) RULES

To avoid the ATR Rules to establish consumer’s ability to repay, creditor may comply by originating a “Qualified Mortgage” (“QM”).

- Depending on its pricing, QM loan creates conclusive or rebuttable presumption that originating creditor complied with ATR Rules. 12 C.F.R. § 1026.43(e)(1).

QM RULES (cont'd.)

Lower-Priced QM

- Provides creditor and its assignee with a *safe harbor* – the creditor is conclusively presumed to have complied with the ATR requirements when making the QM loan
- Pricing: APR exceeds APOR by less than 1.5% for first mortgage loan or by less than 3.5% for junior lien loan
 - Small creditor QM loan (first and junior lien loans): APR exceeds APOR < 3.5%.

QM RULES (cont'd.)

Higher-Priced QM Loan

- Establishes *rebuttable presumption* that creditor complied with ATR Rules when making the QM loan
 - In order to rebut presumption, consumer must prove that creditor made inaccurate determination that he had sufficient residual income, based on information available when loan closed
- Pricing: APR exceeds APOR by 1.50% or more for first mortgage loan or 3.5% or more for junior lien loan

QM RULES (cont'd.)

- Special Pricing for Small Creditor Portfolio and Balloon Payment QM Loan:
 - Lower-Priced QM: $APR < 3.5\%$ over APOR for first – and junior-lien loans
 - Higher-Priced QM: $APR \geq 3.5\%$ over APOR for first – and junior lien loans

QM RULES (cont'd.)

QM classification reduces, but does not eliminate, possibility of consumer litigation

- Safe Harbor QM
 - 1) Loan meets general or temporary QM requirements; and
 - 2) APR < 1.5% above APOR

 - Consumer can still:
 - 1) Challenge lender's conclusion that his loan met QM definition
 - 2) Sue creditor for violating any other federal consumer lending law
- Rebuttable Presumption QM
 - 1) Loan meets general or temporary QM requirements; and
 - 2) APR \geq 1.50% above APOR (higher-priced mortgage loan)

 - Consumer can still:
 - 1) Rebut presumption that creditor did not properly determine his ATR (e.g., creditor did not properly consider his DTI and residual income)
 - 2) Sue creditor for violating any other federal consumer lending law

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QM RULES (cont'd.)

Four categories of QMs

1. Standard QM Loan:

- No excess up-front points and fees: Points and fees do not exceed 3% of total loan amount \geq \$100,000.
 - Certain *bona fide* discount points may be excluded (2% - undiscounted rate \leq APOR + 1%
1% - undiscounted rate \leq APOR + 2%)
 - Higher points and fees threshold for smaller loans

QM RULES (cont'd.)

- No toxic loan features

No interest-only, negative amortization or balloon payment loans

- QM balloon loans permitted for small lenders under certain circumstances
- Maximum loan term: 30 years

QM RULES (cont'd.)

- Underwriting Requirements:
 - Use maximum rate in first 5 years after first payment, fully amortizing
 - Consider and verify income and assets
 - Consider and verify current debts, alimony and child support
 - Monthly DTI ratio: 43% or less (Appendix Q procedures)

12 C.F.R. 1026.43(2), 3.

QM RULES (cont'd.)

2. Temporary QM Loan:

- For 7 years (until Jan. 10, 2012) or until agency adopts its own QM rule, QM status is extended to loans that are eligible for purchase by Fannie Mae or Freddie Mac or guaranteed by certain federal agencies
 - HUD and VA have already adopted QM rules for FHA and VA loans
- Temporary QM Loan is underwritten based on standards of GSE or insuring agency, rather than QM Rules.
 - 43% DTI ratio does not apply

QM RULES (cont'd.)

Small Creditor QM Loans

Two 2 types of QM loans may only be made by a “small creditor” that:

- (1) Has \leq \$2 billion in assets
- (2) (With affiliates) originated no more than 500 covered transactions during prior year

3. Portfolio QM Loan (12 C.F.R. 1026.43(a)(5)):

- No restriction on location of loan collateral
- Creditor must hold QM loan in portfolio for 3 years
- Same underwriting criteria as for Standard QM Loan, except for 43% DTI and residual income limitations
- Same points and fees limitations as for Standard QM Loan

QM RULES (cont'd.)

4. Balloon-Payment QM Loans (12 C.F.R. § 1026.43(e)(6), (7))

- Regular periodic payments (other than balloon payment) must reduce principal balance (no negative amortization or interest-only payments) using 30-year amortization schedule
- Same points and fee limitations as for Standard QM loan
- Loan term of 5 years or longer
- Originating creditor must hold loan in portfolio for 3 years
- Creditor must consider and verify consumer's income or assets and debts, but no specific DTI limitation

QM RULES (cont'd.)

- Beginning January 10, 2016, Small Creditor Balloon QM Loan may only be made by qualified small creditor that, during preceding year, extended $\geq 50\%$ of its total 1st mortgage loans secured by properties located in counties designated as “rural” or “underserved” by CFPB
 - Small creditors lending in other geographies are expected to be ready to offer ARM loans by 2016

REALITY CHECK

Many creditworthy applicants do not qualify for QM Loan for various reasons.

- A job change or new baby could be enough to cause his DTI to exceed 43%
- Income stream of self-employed person may vary significantly from year to year
- This group is having difficulty getting access to credit because many creditors will only make QM Loans

LENDER UNCERTAINTY: WHAT ARE THE POTENTIAL RETURNS, INTEREST RATE RISKS AND COSTS OF NON-QM LOANS?

The potential profits represented by this significant pool of “non-QM” applicants is appealing to some lenders but the availability of mortgage credit for these would-be applicants is tight

- ATR Rules give lenders lots of discretion in determining an applicant’s ATR, but Rule’s lack of clear standards keep away risk-averse lenders
 - They will wait until clear ATR standards emerge before entering the non-QM market
- Lenders have no legal protection against ATR violation in non-QM loans, but these loans may be profitable since willing lenders can charge more for them

UNCERTAINTY (cont'd.)

The few lenders making non-QM Loans use similar strategies:

- Make 5-year ARM loans, reducing rate risk
- Use residual income test to vet the ATR decision
 - VA guidelines are popular among these lenders because of VA loans' traditionally low delinquency rates

UNCERTAINTY (cont'd.)

Secondary market concerns:

- The few lenders willing to make non-QM loans are most likely banks
 - They can let the loans “season” in portfolio to ensure fewer defaults before selling to investor;
 - Mortgage bankers don’t have the capital to hold illiquid loans; they need to sell to investor right away
- Non-QM Loan volume is too low to interest secondary market so far

UNCERTAINTY (cont'd.)

- Because of current lack of certain underwriting standards, there are few, if any, automated underwriting systems for non-QM Loans
 - Eventually, through litigation and enforcement actions, the ATR underwriting standards will become clearer and secondary markets for this product will emerge
- Potential ATR liability is most relevant because of its impact on availability of credit; lack of liquidity (secondary market) in non-QM Loans is reason they're not being made

UNCERTAINTY (cont'd.)

Biggest risk to Lenders/Assignees for ATR violation is cost of litigation delay but several elements must be satisfied before consumer can get to TILA defense

Conditions predicate to liability for ATR violation:

- Borrower must be in default [good underwriting – low default rates]
- Creditor/Assignee must foreclose after default (good servicing and extensive loss mitigation efforts reduce number of foreclosures)
- Borrower must contest foreclosure; not all foreclosures are contested

UNCERTAINTY (cont'd.)

- Borrower has burden of proving the Lender didn't accurately determine his ATR when loan was made
 - If loan is well-underwritten, default rate should be low

How does creditor prove verification of ATR requirement?

- Borrower's discovery requests will delay litigation (no summary judgment) and increase litigation costs
 - This gives borrower leverage for extracting settlement, even if ATR compliance is verified
- Settlement may become more attractive alternative

UNCERTAINTY (cont'd.)

Lender in “commando” non-QM loan has no statutory protection against ATR violation defense claim

- Keep close tabs on default rates on these loans; change underwriting criteria as needed to reduce defaults
- Keep good records; document everything possible to show how ATR determination was made

UNCERTAINTY (cont'd.)

Lender in higher priced QM with rebuttable presumption claim doesn't have significantly more protection than for non-QM loan

- Consumer can still challenge creditor's compliance with ATR requirements, leading to prolonged and expensive discovery, forcing creditor to defend how it considered those factors

QM summary judgment will be easier to obtain because of presumption, but it may still be expensive; "depth" of safe harbor is uncertain

- Consumer can challenge creditor's determination of loan's QM status but QM status should be less expensive

POSSIBLE RELIEF?

- Provide more access to credit by expanding “small creditor” definition so more banks could make portfolio QM loan not subject to 43% DTI, with higher APR threshold for QM safe harbor
 - CFPB solicited public comment on current “small creditor” definition
 - Comment period closed July 7, 2014; no further action since then
 - Suggestions received
 - Increase or eliminate current originations limit of 500 1st mortgage covered transactions per year
 - ❖ Many small banks will ration credit to maintain “smaller creditor” status

POSSIBLE RELIEF? (cont'd.)

- Eliminate nonbank affiliate's loans from annual threshold
- Allow small creditors to continue making QM balloon loans, rather than substituting ARM loan product

POSSIBLE RELIEF? (cont'd.)

- CFPB has adopted rule establishing temporary “points and fees” cure
 - “Cure” requires 3 elements:
 1. Lender acted “in good faith” in originating QM loan and loan meets other QM criteria
 2. Lender (or investor) refunds points and fees overage to borrower within 210 days and before consumer sues or notifies the lender in writing of the problem
 3. Lender (or investor) implements and follows policies and procedures for post-closing loan review to ensure refunds are made when necessary

POSSIBLE RELIEF? (cont'd.)?

- CFPB also requested comment on what conditions should apply to cure or correct QM DTI limits
- Comments blamed vagueness of Appendix Q's standards as reason for many DTI errors; more specific standards would prevent DTI errors from occurring.

MORTGAGE LOAN SERVICING

Final Mortgage Servicing Rules

- **Issued:** January 17, 2013
- **Became Effective:** January 10, 2014
- **Limited Amendments:** October 2013,; May 2014
- **The Rules Amend Regulation Z and Regulation X**
 - TILA: Regulation Z, 12 C.F.R. Part 1026
 - RESPA: Regulation X, 12 C.F.R. Part 1024

Products Covered by the New Rules

- Closed End Loans
- Secured By Dwelling
- Principal Residence
- Excludes
 - Open-Ended Credit Lines and HELOCs
 - Reverse Mortgages
 - Timeshare Loans
 - Some small servicers

Topics Covered by the New Rules

- 1) Periodic Statements
- 2) ARM Notices
- 3) Payoff Statements and Prompt Crediting of Payments
- 4) Error resolution and information requests
- 5) Early intervention with delinquent borrowers
- 6) Continuity of contact with delinquent borrowers
- 7) Loss Mitigation procedures
- 8) Force-placed insurance
- 9) Information management policies and procedure

Reorganized Subpart C of Regulation X

- 1024.30 Scope
- 1024.31 Definitions
- 1024.32 General disclosure requirements
- 1024.33 Mortgage servicing transfers
- 1024.34 Timely payments by servicer
- 1024.35 Error resolution procedures
- 1024.36 Requests for information
- 1024.37 Force-placed insurance
- 1024.38 General servicing policies, procedures, and requirements
- 1024.39 Early intervention requirements for certain borrowers
- 1024.40 Continuity of contact
- 1024.41 Loss mitigation procedures

Overview of Error Resolution and Information Request Rules

- Dodd-Frank Act Amendments to RESPA
 - Shortened response times for QWR process.
 - Added new obligations on servicers to take timely action to “correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure or other standard servicer’s duties.”
 - Also requires servicers to provide information regarding the owner or assignee of the loan.

Overview of Error Resolution and Information Request Rules (cont'd.)

- CFPB recognized the competing obligations imposed by the QWR procedures, the new Dodd-Frank requirements and other requirements.
- Attempted to create a unified requirement for servicers to respond to errors and information requests provided by borrowers, without regard to whether the request constitutes a QWR.

Overview of Error Resolution and Information Request Rules (cont'd.)

- QWRs become just one type of notice of error or information request.
- No benefit to borrower to submit QWR versus other notice of error or information request.
- Same response requirements.
- Same penalty provisions for non-compliance.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Notices of error must be in writing
 1. Identify name of borrower,
 2. Information to identify mortgage loan account, and
 3. The error the borrower believes has occurred.
- Not on lender-supplied payment coupon
- List of covered errors

Overview of Error Resolution and Information Request Rules (cont'd.)

“Covered Errors”:

- (1) Failure to **accept a payment** that conforms to the servicer’s written requirements for the borrower to follow in making payments.
- (2) Failure to **apply an accepted payment** to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.
- (3) Failure to **credit a payment as of the date of receipt** that results in a charge or reporting negative information to a consumer reporting agency.

NOTE: If a servicer accepts a payment that does not conform to the specified written requirements, the servicer must credit the payment as of **5 days after receipt**. 12 C.F.R. 1026.36(c).

Overview of Error Resolution and Information Request Rules (cont'd.)

“Covered Errors”:

- (4) **Failure to pay** taxes, insurance premiums, or other charges (including voluntary **escrow items**) in a **timely** manner **or to refund an escrow account balance** as required by § 1024.34.
- (5) Imposition of a **fee or charge** that the servicer **lacks a reasonable basis** to impose.
- (6) Failure to **provide an accurate payoff balance amount** upon a borrower’s request in violation of § 1026.36(c)(3) (**7 days**).
- (7) Failure to provide **accurate information** to a borrower for **loss mitigation options and foreclosure**, as required by § 1024.39.

Overview of Error Resolution and Information Request Rules (cont'd.)

“Covered Errors”:

- (8) Failure to **accurately and timely transfer information** relating to the servicing of a borrower’s mortgage loan account **to a transferee servicer**.
- (9) Making the **first notice or filing** required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).
- (10) Moving for foreclosure judgment or order of sale or conducting a foreclosure sale in violation of § 1024.41(g) or (j).
- (11) **Any other error** relating to the servicing of a borrower’s mortgage loan.

Overview of Error Resolution and Information Request Rules (cont'd.)

- General Timelines

- 5 business days to acknowledge receipt.
- 7 business days to provide payoff amount.
- 30 business days to respond to other errors.
 - Potential 15 day extension.
 - During the 30 day period, the servicer must investigate the error identified by the borrower.

Overview of Error Resolution and Information Request Rules (cont'd.)

- The servicer must respond to a notice of error by either:
 - (A) **Correcting the error** with notification of the correction, the date of the correction, and contact information for further assistance; or
 - (B) Providing the borrower with a notification that includes a statement that the **servicer determined that no error occurred**, the reason(s) for this determination, the borrower's right to request documents relied upon by the servicer in reaching its determination and how to request such documents, and contact information for further assistance.

Overview of Error Resolution and Information Request Rules (cont'd.)

- If during a reasonable investigation of a notice of error, a servicer concludes that errors occurred **other than, or in addition to**, the error(s) alleged by the borrower, the servicer must correct the error(s) and provide the borrower with a notification that describes the error(s) the servicer identified, the action taken to correct the error(s), the applicable date for the correction, and contact information for further assistance.

Overview of Error Resolution and Information Request Rules (cont'd.)

- A servicer may request supporting documentation from a borrower, but **may not**
 - (i) Require a borrower to provide such information as a condition of investigating the alleged error; or
 - (ii) Determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Upon request from the borrower, the servicer must provide (at no charge) **copies of all documents and information relied upon by the servicer** in making its determination within 15 business days.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:
 1. **Error asserted before foreclosure sale** – The servicer receives a notice of error 7 or fewer days before a foreclosure sale which asserts:
 - (1) The servicer made the **first notice or filing** for foreclosure before the borrower was 120 days delinquent or after receipt of completed loss mitigation application in violation of § 1024.41(f), (j); or
 - (2) The servicer **moved for foreclosure judgment or order of sale or conducted foreclosure sale** after receipt of complete loss mitigation application submitted after first notice or filing for foreclosure but at least 37 days before foreclosure sale in violation of § 1024.41(g), (j). 12 C.F.R. § 1024.35(f)(2).

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgment and response exceptions:

1. **Error asserted before foreclosure sale** –

Instead, the servicer may make a good faith attempt to respond to the borrower, orally or in writing, and either correct the error or state the reason the servicer has determined that no error has occurred.

- CFPB explained that this limited exception reduces “the procedural requirements for servicers to follow for such notices [and] mitigates the concern that borrowers may use error resolution procedures to impede foreclosure, while maintaining protection for consumers.”
- “Good faith attempt” is not defined.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:
 2. **Duplicative errors** – An asserted error is **substantially the same** as an error previously asserted by the borrower for which the servicer has previously complied, unless the borrower provides new and material information to support the asserted error.
 - New and material information means **information that was not reviewed** by the servicer in connection with investigating a prior notice of error and is **reasonably likely to change a servicer's prior determination** about the error.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:

3. Overbroad notice of error –

- Does not allow the servicer to **reasonably determine** the specific alleged covered error.
- The servicer is still required to acknowledge and respond to a valid assertion of an error in a submission that is otherwise overbroad or unduly burdensome.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:
 4. **Untimely notice of error** – A notice of error is untimely if the error is asserted more than one year after:
 - (A) Servicing for the mortgage loan that is the subject of asserted error was transferred from the servicer receiving the notice of error to a transferee servicer; or
 - (B) The mortgage loan is discharged.

Overview of Error Resolution and Information Request Rules (cont'd.)

- If the servicer determines it is not required to comply with the requirements, the servicer must notify the borrower of its determination in writing not later than **5 business days** after making the determination.
- In all instances, servicers are prohibited from furnishing adverse information to consumer reporting agencies regarding any payment that is the subject of a notice of error for **60 days**.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Requests for information are treated the same as notices of error.
- Must provide the identify of and address of the owner or assignee of the mortgage loan within **10 business days** after the request.
- Otherwise, the **5 business day** acknowledgment and **30 business day** response requirements apply.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:
 1. **Duplicative information** – Request is **substantially the same** as information previously requested by the borrower for which the servicer has previously provided.
 2. **Confidential, proprietary, or general corporate information** – The borrower requests confidential, proprietary, or general corporate information.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:
 3. **Irrelevant information** – The request is not directly related to the borrower's mortgage loan account.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:
 4. **Overbroad or unduly burdensome information request** – Requests an **unreasonable volume** of documents or information. An information request is unduly burdensome if a diligent servicer could not respond without either **exceeding the maximum time limit or incurring costs (or dedicating resources)** that would be unreasonable in light of the circumstances.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Acknowledgement and response exceptions:
 5. **Untimely information request** – More than one year after:
 - (A) Servicing for the mortgage loan that is the subject of the information request was transferred from the servicer receiving the request for information to a transferee servicer; or
 - (B) The mortgage loan is discharged.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Just like with notices of error, if the servicer determines it is not required to comply with these requirements, the servicer must notify the borrower of its determination in writing not later than **5 business days** after making the determination.

Overview of Error Resolution and Information Request Rules (cont'd.)

- Allows servicers to establish **an address** that the borrower must use to submit a notice of error or request for information.
- Must be included in:
 - The written notice designating the specific address, required pursuant to § 1024.35(c) and § 1024.36(b).
 - Any periodic statement or coupon book required pursuant to § 1026.41.
 - Any website the servicer maintains in connection with the servicing of the loan.
 - Any notice required pursuant to §§ 1024.39 (early intervention) or 1024.41 (loss mitigation) that includes contact information.

Overview of Error Resolution and Information Request Rules (cont'd.)

- If a borrower incorrectly submits an assertion of an error to the address for loss mitigation applications or to the continuity of contact, the servicer must **inform the borrower of the procedures for submitting written notices of error**, including the correct address.
- Or the servicer could **redirect** such notices to the correct address.

Overview of Error Resolution and Information Request Rules (cont'd.)

- CFPB issued Bulletin 2013-12
 - deceased borrowers
 - communication with borrowers under the Early Intervention Rule
 - obligation to provide notices/communications to borrowers who exercised cease communications rights under the FDCPA

Overview of Error Resolution and Information Request Rules

- Bulletin 2013-12 – **Advisory Opinion – Safe Harbor**
 - “The CFPB concludes that the FDCPA “cease communication” option does not generally make servicers that are debt collectors liable under the FDCPA if they comply with certain provisions of **Regulation X (12 CFR 1024.35 (error resolution), 1024.26 (requests for information), 1024.37 (force-placed insurance), and 1024.41 (loss mitigation) and Regulation Z (12 CFR 1026.20(d) (adjustable-rate mortgage (ARM) initial rate adjustment) and 1026.41 (periodic statement)).**”
 - Servicer that provide disclosures to communicate with borrower under these provisions **are not liable under the FDCPA**

Challenges and Practical Issues

- Understanding what constitutes a notice of error or information request.
 - Notices/Requests received during litigation.
 - Notices/Requests received by counsel.
- Determining which errors are “covered errors” and which are included in the catch-all provision.
- Implementing reasonable procedures to verify information and correct mistakes.
- Understanding what is duplicative, overbroad, or untimely.

Overview of Early Intervention Rules

- Purpose of the Rule:
 - To contact the borrower early in the loss mitigation process and let the borrower know of **loss mitigation options** and availability of **homeownership counseling**

Overview of Early Intervention Rules: Timing of Contact

- Two types of contact are required if borrower fails to make payment covering principal, interest and escrow (if applicable):
 - Live contact
 - No later than 36th day of delinquency
 - Inform of availability of loss mitigation options, if appropriate
 - “Live” = telephone or in-person; not a recorded message
 - Written contact
 - By 45th day of delinquency
 - No more than once in 180-day period
 - Model Forms

Early Intervention Rules: Conflict Between Contacts and Other Law

- Rule states “[n]othing in this section shall require a servicer to communicate with a borrower in a manner otherwise prohibited by applicable law.”
§ 1024.39(c).
- Commentary explains this section does not require a servicer to communicate with a borrower in a manner that would be **inconsistent with applicable bankruptcy law or a court order in a bankruptcy case**.
- Commentary also explains servicer may “**adapt**” these requirements in any manner that would permit them to notify borrowers of loss mitigation options.

Early Intervention – Interim Final Rule

- CFPB issued interim final rule and Bulletin 2013-12.
 - Interim Final Rule – **Bankruptcy**
 - Exemption from the Early Intervention requirements for borrowers in bankruptcy (upon filing of petition)
 - Applies to any joint obligor with primary liability who files bankruptcy.
 - Must resume compliance after first delinquency following earliest of: (1) dismissal; (2) closing of case; (3) discharge.
 - Revival of case triggers exemption again.
 - Seeks comment on triggers, resumption of early intervention and tailoring of communications.

Early Intervention – Interim Final Rule (cont'd.)

- CFPB issued interim final rule and Bulletin 2013-12.
 - Interim Final Rule – **FDCPA**
 - Exempts a servicer subject to the FDCPA from the early intervention requirements with regard to a mortgage loan for which the borrower has sent a cease communications demand under FDCPA 805(c)
 - ❖ What about the CFPB’s July 10, 2013 Bulletin?
 - ❖ Can you treat all borrowers the same for ease of compliance?
 - “Servicers are encouraged to pursue loss mitigation options to the extent that the FDCPA permits”
 - Why not part of the Bulletin?
 - “...**upcoming rulemaking on debt collection...**”

Challenges and Practical Issues

- “Live contract” = telephone or in-person; not a recorded message
- Consider TCPA compliance/exposure related to call attempts
 - Revocation of consent
 - Reassigned numbers
- Consider state law limitations on number of contacts
- Consider disclosure requirements
 - FDCPA, UDAAP, state law

Overview of Continuity of Contact Rules

- Rule is found in § 1024.40
- Rule is meant to correct documented customer service problems
- Small servicers are exempt

Overview of Continuity of Contact Rules (cont'd.)

- Servicers must design policies and procedures that:
 - Assign personnel to delinquent customers by the **45th day of the consumers' delinquency**, or first contact;
 - Allow consumers to reach the assigned personnel by phone and such personnel can respond to consumer inquiries about loss mitigation;
 - Ensure personnel can retrieve, in a timely manner, the complete record of the consumer's payment history and all other information necessary for the loss mitigation app.;
 - Ensure that personnel can provide a timely live response to consumers who call and leave a message.

Overview of Continuity of Contact Rules (cont'd.)

- Single Point of Contact?
 - Up to the servicer whether to assign a single person or a team of personnel to respond to a delinquent consumer.
 - Personnel may be single purpose or multi-purpose personnel
 - Can have experience with bankruptcy
 - Personnel must be made available until consumers have made 2 consecutive on time payments. If then the consumer re-defaults, you get to start process again!

Challenges and Practical Issues

- What happens when the consumer re-defaults after he made 2 consecutive on time payments?

Overview of Loss Mitigation Rules

- Pre-Dodd-Frank and New Rules
 - National Mortgage Servicing Settlement
 - Contested Foreclosure Litigation
 - Dual Tracking Challenges
 - Modification Programs
 - HAMP Modifications
 - Trial Periods

Overview of Loss Mitigation Rules (cont'd.)

- Three Goals of New Rules:
 - 1) **Timeliness:** Requires servicers that offer loss mitigation options to provide timely information to borrowers about how to apply and then to evaluate complete applications timely.
 - 2) **Resolution of Loss Mitigation Options Before Foreclosure Sales:** Generally prohibits foreclosure sales until timely and complete loss mitigation applications are reviewed, decided, borrower is notified of decision and appeal process expires.
 - 3) **Prevent Delay Tactics:** Sets timelines that are designed to be completed without requiring suspension of foreclosure sales accomplished by delay tactics.

Overview of Loss Mitigation Rules (cont'd.)

- **Servicers** are required to exercise reasonable diligence in obtaining information from borrowers to make loss mitigation applications complete.
- There is no requirement to offer any specific loss mitigation option at all— servicers must evaluate consumers for loss mitigation options pursuant to requirements imposed by owners or investors of the mortgage loan.
- There is no requirement as to what information has to be contained in an application.

Overview of Loss Mitigation Rules (cont'd.)

- What is an **application**?
 - “A loss mitigation application is an expansive concept. It includes a consumer’s assertion of an interest in evaluation for a loss mitigation option, if the assertion is accompanied by information the servicer may consider when evaluating a loss mitigation option.” Small Entity Compliance Guide, p. 87
 - “You should make sure your staff is trained to recognize when an inquiry about loss mitigation has become a loss mitigation application.”

Overview of Loss Mitigation Rules (cont'd.)

- If servicers receive a loss mitigation application **45 days** or more before a foreclosure sale, servicers must:
 1. Determine if application is complete;
 2. Send acknowledgement within 5 days and either:
 - ❖ Indicate additional information that is needed and provide deadline to provide such information; or
 - ❖ Evaluate application within 30 days
 3. Deny or approve loss mitigation application; providing borrowers 7 or 14 days to respond;
 4. If applicable, provide borrower right to appeal.

Overview of Loss Mitigation Rules (cont'd.)

- What is a **complete application**?
 - Servicer has received all the information it needs from a consumer **to evaluate the consumer for *all* loss mitigation options** available from the owner or investor of the loan.
 - When a consumer sends everything you have asked “other than **information that is not in the consumer’s control.**”
 - Cannot evade the requirement to evaluate complete loss mitigation applications by evaluating an incomplete one. § 1024.41(c)(2) and Comment 41(c)(2)(ii)-1.

Overview of Loss Mitigation Rules (cont'd.)

- Servicers determining that the application is incomplete must provide a notice within **5 days** (excluding legal public holidays and weekends), acknowledging receipt and providing:
 1. Application is incomplete;
 2. Additional documents and information are needed to make application complete;
 3. Reasonable date by which borrower must submit those documents and information, considering the date info will become stale and/or foreclosure sale etc.;
 4. Consumer should consider contacting servicers of any other mortgage loans on the same property.

Overview of Loss Mitigation Rules (cont'd.)

- What happens when the application looks complete but, upon further review, it is incomplete?
 - Amendments to rules clarified that the servicer must use reasonable diligence to obtain missing information.
 - Servicer is only protected for “good faith errors” in evaluation.
 - Borrower must have reasonable time to get information (minimum 7 days).
 - Referral to foreclosure counsel and final foreclosure sale cannot be done in this instance, even though application is incomplete.

Overview of Loss Mitigation Rules (cont'd.)

- Within **30 days*** of receipt of complete loss mitigation application, the servicer must:
 - Send an acknowledgement within 5 days, telling the borrower to contact other servicers, where application received more than 45 days from foreclosure sale.
 - Evaluate **all** loss mitigation options.
 - Provide the borrower with a notice stating determination of whether the servicer will offer a loss mitigation option.
 - If the borrower is denied, the notice must state the specific reasons for denial; and
 - The borrower's right to appeal, the deadline for appeals and the requirements for appealing.
- * If servicer receives complete application more than 37 days before the foreclosure sale.

Overview of Loss Mitigation Rules (cont'd.)

▪ Incomplete Applications

- If the application is incomplete, servicer still may evaluate the application, after executing reasonable diligence to complete the application and the application remains incomplete for a “**significant period of time.**”
- This does not count as an evaluation of a complete loss mitigation application.
- New amendments clarify that a servicer can provide a forbearance based on an incomplete application.

Overview of Loss Mitigation Rules (cont'd.)

- Denial notice may be combined with other notices required by law
- Servicer must send a notice that gives specific reasons for each ***loan modification*** option denied
 - If you have 4 loan modification options, and you offer consumer only 1, the other 3 are denied (Comment 41(d)(1)-4)
 - Denial based on net present value calculations, then you must include specific values used in your net present value calculation
 - You must be specific as to reasons for denial and specify that consumer not evaluated for other criteria.

Overview of Loss Mitigation Rules (cont'd.)

- If application is submitted at least 90 days before foreclosure sale, servicer may require borrower to respond to loss mitigation offer within at least **14 days**.
- Between 90 and 37 days before the sale -- 7 days.
 - Submission of first payment under loss mitigation option within stated deadline = acceptance (maybe)...
 - Servicer may deem failure to accept within 7 or 14 days as a rejection.
 - Borrower may accept/reject and appeal at the same time.
 - Appeal reviewed and decided by different independent personnel.
 - Appeal must be decided within **30 days**.

Overview of Loss Mitigation Rules (cont'd.)

- Assuming account is more than 120 days delinquent, servicer **cannot refer to foreclosure counsel, obtain judgment, or conduct a foreclosure sale** if the borrower submitted a complete loss mitigation application **unless**:
 - Servicer provided denial letter as required by new rule and either: (i) appeal process is not applicable; (ii) borrower has not requested appeal; or (iii) the time for requesting an appeal has expired (at least 14 days from notice).
 - Servicer denies appeal.
 - Borrower rejects offer of loss mitigation option.
 - Borrower fails to perform under accepted loss mitigation option.

Overview of Loss Mitigation Rules (cont'd.)

- What is a servicer's obligation to evaluate an loss mitigation application received 37 days or less before the foreclosure sale is scheduled?
 - Answer: NONE!
- There is nothing to prevent a servicer from considering a late application.

Summary of Loss Mitigation Review Obligations

Days Before Foreclosure	Review Complete Application?	Send Notice Within 5 Business days?	Time Period for Borrower to Accept Offer	Right to Appeal
37 or less	N	N	0	N
38-44	Y	N	7	N
45-89	Y	Y	7	N
90 or more	Y	Y	14	Y

Overview of Loss Mitigation Rules (cont'd.)

- Servicer cannot make “first notice or filing” or start judicial or nonjudicial foreclosure process until borrower is more than 120 days delinquent.
- “First notice or filing” is defined in Comment 41(f)
 - First notice or filing can be complaint, or earliest document that sets the foreclosure sale
 - A document provided to the borrower but not initially required to be filed, recorded, or published is not considered the first notice or filing on the sole basis that the document must later be included as an attachment accompanying another document that is required to be filed, recorded, or published to carry out a foreclosure.

Overview of Loss Mitigation Rules (cont'd.)

- Once you receive a completed loss mitigation application, and servicer has made the first filing, you cannot continue to proceed by foreclosure until:
 - Consumer notified that loss mitigation application is denied and the consumer has exhausted the appeals process;
 - Consumer rejects loss mitigation offers; or
 - Consumer does not perform under loss mitigation.

Overview of Loss Mitigation Rules (cont'd.)

- A borrower may enforce the provisions of the loss mitigation section under Section 6(f) of RESPA.
- This means a borrower may recover
 - 1) Actual Damages
 - 2) Additional Damages of up to \$2,000 for a pattern or practice
 - 3) Class Action Cap of lesser of \$1 M or 1% of net worth
 - 4) Attorneys' Fees and Costs
- Query: is there a 60 day ability for servicer to correct as stated in 12 U.S.C. § 2605(f)?
- Statute of Limitations – 3 years (12 U.S.C. § 2614)

Challenges and Practical Issues

- Flagstar Consent Order
 - Executed with CFPB on September 29, 2014.
 - First Consent Order addressing Mortgage Servicing Rule.
 - Based on conduct before and after January 10, 2014
 - Legal Authority
 - Unfair acts and practices under UDAAP, 15 USC § 5336.
 - Also found a violation of 12 CFR 1024.41.

Challenges and Practical Issues (cont'd.)

- Flagstar Consent Order Allegations
 - Insufficient staff to handle loss mitigation
 - Failure to exercise “reasonable diligence” in obtaining documents and information to obtain a complete loss mitigation application
 - No written policies or procedures:
 - No quality assurance:
 - Inadequate servicing systems
 - Withholding information needed to complete loss mitigation applications
 - Exceeding the trial period for loan modifications under GSE and investor requirements

Challenges and Practical Issues (cont'd.)

- Flagstar Consent Order Allegations
 - Failing to Send the proper notice to acknowledge/identify missing documents within 5 business days
 - Failed to decide application within 30 days.
 - Failed to notify borrower in writing of determination of which loss mitigation options it would offer the borrower within 30 days
 - Failed to provide the specific reason(s) for denial of each loan modification option;
 - Failed to notify the borrowers of their right to appeal

Challenges and Practical Issues (cont'd.)

- Flagstar Consent Order Remedies
 - \$27.5 million in monetary damages.
 - \$10 million civil monetary penalty.
 - Injunctive Relief
 - Focus on compliance improvements
 - Third Party Review
 - Prohibition against servicing defaulted loans until implementation of Compliance Plan

QUESTIONS?