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Inside

Mortgage Servicers' Duties Under Regulation X to Respond to Notices of Error and Requests for Information

By Alinda Murphy, Senior Examiner, Federal Reserve Bank of Kansas City

In 2020, according to Home Mortgage Disclosure Act (HMDA) data, lenders originated 13.2 million closed-end HMDA loans, a 67 percent increase from 2019.[1] These new loans are a subset of the larger market of outstanding one- to four-family residential mortgage loans, which reached nearly $11 trillion in 2020, according to Federal Reserve data.[2] For mortgage servicers, the large number of outstanding closed-end loans increases compliance risk.

Regulation X requires servicers to timely and properly respond to a written error notice and/or requests for information pertaining to a servicing issue. A servicer's failure to comply can lead to examination issues and legal risk because of the potential for consumer harm. To facilitate compliance, this article reviews a servicer's obligations in responding to error notices under §1024.35 and requests for information under §1024.36, which may increase because COVID-19 forbearances and foreclosure moratoriums are expiring. This article is part of a series of recent *Consumer Compliance Outlook* articles on error resolution requirements for federal consumer protection laws.[3]

DEFINITIONS

Before reviewing the requirements under §1024.35 and §1024.36, it is important to clarify key definitions.

Federally Related Mortgage Loan

Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), applies to a *federally related mortgage loan*. The regulation generally defines this term as a loan secured by a lien on a residential property, where there is or will be a structure for one to four families, or a manufactured home and meeting certain other requirements.[4]

The regulation exempts business purpose loans, temporary financing, loan conversions, assumptions without the lender's approval, secondary market transactions, and loans secured by vacant or unimproved land from the scope of its coverage.[5]

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Overview of Federal Consumer Privacy and Security Laws for Financial Services

By Kenneth Benton, Principal Consumer Regulations Specialist, Federal Reserve Bank of Philadelphia

A recent Pew Research Center survey found that 79 percent of consumers are concerned about how companies use their personal data.[1] This concern is heightened as identity theft and large data breaches have proliferated in recent years. For example, the 2017 Equifax breach affected 147 million people and involved personal financial information that could be used for identity theft, including Social Security numbers.[2]

To protect consumers' privacy interests, several federal laws and regulations restrict the ways in which financial institutions can obtain and use information about their customers. This article provides an overview of certain financial services-related privacy and security requirements, including recent legislation and regulatory amendments.

PRIVACY NOTICES UNDER GRAMM–LEACH–BLILEY ACT AND REGULATION P

The Gramm–Leach–Bliley Act (GLBA) requires financial institutions to provide consumers with a privacy notice disclosing that a consumer's nonpublic personal information (NPI) is shared with nonaffiliated third parties, describing the consumer's ability to opt out of sharing practices in certain circumstances, and explaining how to exercise their right to opt out.[3] The Consumer Financial Protection Bureau's (Bureau) Regulation P, 12 C.F.R. Part 1016, implements the GLBA privacy provisions. Regulation P defines *NPI* as personally identifiable financial information and any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.[4]

Initial Notice

A financial institution must issue its GLBA privacy notice when it first establishes a customer relationship. This notice is provided annually thereafter, subject to an exception under the 2015 Fixing America's Surface Transportation (FAST) Act discussed next.[5] An institution generally must also issue a notice to its consumer customers before disclosing any NPI about them to any nonaffiliated third party[6] and disclose the right to opt out of information sharing in the privacy notices.[7] Certain exceptions apply, such as sharing information with nonaffiliated third parties to perform services or to conduct joint marketing, provided other requirements are satisfied.[8]

Each of these notices must provide information about the NPI the institution collects and discloses.[9] This requirement applies to the information of both current and former customers.[10] Model forms are available in the appendix to Regulation P.

Effect of Change in Privacy Practices

The regulation also addresses a financial institution's obligations if it changes its privacy practices to disclose:

- a *new category of NPI* to a nonaffiliated third party;
- NPI to a *new category of nonaffiliated third parties*; or
- NPI about *a former customer* to a nonaffiliated third party, if the former customer had an opportunity to opt out of the disclosure.[11]

For these changes, the institution cannot disclose the NPI unless it provides a revised privacy notice and opt-out opportunities.[12] An exception applies if a new nonaffiliated third party was adequately described in the prior notice.[13]

FAST Act Amendment to GLBA's Annual Privacy Notice Requirements

Financial institutions expressed concern that providing the annual privacy notice to existing customers was burdensome and unnecessary if their privacy practices had not changed since the notice was last provided.[14] In 2015, Congress addressed this issue by amending the GLBA in the FAST Act[15] to eliminate the annual privacy notice requirement if a financial institution satisfies the following two conditions:

- it provides NPI only in accordance with applicable GLBA privacy provisions, and
- it has not changed its policies and practices for disclosing NPI since it provided the most recent notice to its customers.[16]

Because the statutory amendment was self-effectuating, it became effective on December 4, 2015, the date the law was enacted. In August 2018, the Bureau issued a final rule to change Regulation P to conform to the FAST Act amendment.[17]

The rule also addresses the related issue of an institution's obligations when it changes its privacy policy in a way that it no longer qualifies for the exception. The timing requirements to resume providing a privacy notice, and its contents, depend on the reason an institution no longer qualifies for the exception.[18]

PRIVACY REQUIREMENTS UNDER THE FAIR CREDIT REPORTING ACT

Several provisions of the Fair Credit Reporting Act (FCRA) affecting consumer privacy and security are discussed next.

FCRA §624 Affiliate Marketing Requirements

Similar to the GLBA, the FCRA, as implemented by Regulation V, restricts an institution's ability to use certain consumer information with an affiliate. Generally, under §624, a person who receives consumer eligibility information from an affiliate may not use the information to solicit the consumer unless it is clearly and conspicuously disclosed to the consumer that the information may be communicated among the affiliates for purposes of making such solicitations, the consumer is provided an opportunity to opt out, and the consumer does not opt out. The provisions do not apply when the institution has a preexisting business relationship[19] with a consumer and in other specified circumstances.[20] Regulation V provides model notices in Appendix C to 12 C.F.R. Part 1022.

The regulation provides the following example to illustrate §624's requirements:

> A consumer has a homeowner's insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its

> To reduce regulatory burden, Regulation V permits an institution to combine the required opt-out notices for both laws into a single privacy notice.

> affiliated creditor. Based on that eligibility information, the creditor wants to make a solicitation to the consumer about its home equity loan products. The creditor does not have a preexisting business relationship with the consumer and none of the other exceptions apply. *The creditor is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.*[21]

If a consumer elects to opt out, the election must be effective for at least five years, unless the consumer revokes it.[22] After it expires, the solicitation restriction still applies unless the consumer has been provided an opt-out renewal notice, a reasonable period to renew, and does not renew.[23]

INTERSECTION OF THE GLBA AND FCRA REQUIREMENTS

Combined Opt-out Notice

As previously discussed, both the GLBA and the FCRA require institutions to provide consumers with opt-out notices of information sharing or use in certain circumstances. To reduce regulatory burden, Regulation V permits an institution to combine the required opt-out notices for both laws into a single privacy notice.[24]

Effect of FCRA Requirements on the Exception to an Annual Privacy Notice

In the preamble to the 2018 final rule, the Bureau clarified that GLBA §503(f)(1) does not preclude financial institutions that provide NPI in accordance with FCRA §603(d)(2)(A)(iii) or §624 from qualifying for the annual privacy notice exception.[25]

FCRA FIRM OFFER OF CREDIT OR INSURANCE

The FCRA permits an institution to obtain consumer reports without consumers' permission using specified criteria (e.g., all consumers in Pennsylvania with credit scores of 750 or higher) for purposes of soliciting credit or insurance if the solicitation satisfies the requirements of a *firm offer of credit or insurance*. The FCRA defines this term as "any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer," except that the offer may be further conditioned based on specified criteria.[26]

Because these consumer reports can be obtained without a consumer's permission, the FCRA requires clear and conspicuous disclosure of the following information in the solicitation:[27]

- the transaction used information in the consumer's consumer report;
- the offer was extended because the consumer satisfied the criteria for creditworthiness or insurability;
- the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria or any applicable criteria bearing on creditworthiness or insurability or does not furnish required collateral;
- the consumer has a right to opt out of offers of credit or insurance; and
- the procedure for the consumer to opt out.

Model forms are available in Appendix D to Regulation V.

OTHER FEDERAL PRIVACY AND SECURITY LAWS

GLBA Exception for Reporting Suspected Elder Abuse

Several federal agencies issued the "Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults" in 2013 to clarify when financial institutions could report suspected elder abuse to appropriate local, state, or federal agencies, which the Federal Reserve discussed in Consumer Affairs letter 13-14. The guidance cited four exceptions to the GLBA notice and opt-out requirements that could permit disclosing NPI for the purpose of reporting suspected elder financial abuse without violating the GLBA[28] and notes that "generally" disclosure of nonpublic personal information to local, state, or federal agencies for the purpose of reporting suspected elder financial abuse will fall within at least one of the exemptions outlined in the GLBA.[29]

The following four exceptions could apply to suspected elder abuse:

- to protect against actual or potential fraud, unauthorized transactions, claims, or other liability;
- to disclose to law enforcement agencies, self-regulatory organizations, or for an investigation on a matter related

to public safety, to the extent it is specifically permitted or required under the Right to Financial Privacy Act or other applicable laws;

- to comply with federal, state, or local laws, such as state laws that require financial institutions to report suspected abuse; or
- to respond to a civil, criminal, or regulatory investigation, subpoena, or summons from authorities, or to respond to judicial process or government regulatory authorities.[30]

The interagency guidance further clarifies that disclosing NPI for the purpose of reporting suspected financial abuse is permissible under the fraud exemption when, for example, the financial institution is (1) reporting incidents that result in taking an older adult's funds without actual consent or (2) reporting incidents of obtaining an older adult's consent to sign over assets where the intent of the transaction has been misrepresented.[31]

Senior Safe Act

In May 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) was signed into law.[32] Section 303 of the EGRRCPA (the Senior Safe Act) provides legal immunity to an individual who served as a supervisor or in a compliance or legal function for certain financial institutions and reports suspected exploitation of a senior citizen to certain agencies and law enforcement, provided the individual previously received specified training and disclosed the information in good faith and with reasonable care.[33] The EGRRCPA also provides immunity to specified financial institutions by which the individuals are employed or associated, provided the individuals received the appropriate training. *Outlook* summarized the Senior Safe Act in Issue 1 2020.

Synthetic Identity Theft and the Social Security Verification Service

Section 215 of the EGRRCPA required the Social Security Administration (SSA) to modify or develop a database for accepting and comparing fraud protection data provided electronically by a permitted entity, which is defined as a *financial institution, service provider, subsidiary, affiliate, agent, subcontractor, or assignee of a financial institution.*[34] The purpose of this provision was to reduce the prevalence of synthetic identity fraud, which disproportionally affects vulnerable populations, such as minors and recent immigrants. In response, the SSA created the Electronic Consent Based Social Security Number Verification (eCBSV) service.[35]

With the written consent of the Social Security number (SSN) holder, the system allows permitted entities to verify if

> "The guidance addresses when a security incident requires an institution to notify its customers and what the notice should include."

the holder's name, date of birth, and number match the SSA's records. The eCBSV returns a match verification of yes or no. If the database shows the SSN holder is deceased, the system returns a death indicator. The SSA began an initial rollout in 2019 with 10 permitted entities. In July 2021, the SSA expanded the rollout. Additional information is available on the eCBSV website.[36]

Interagency Guidance on GLBA Security and Customer Notification Requirements

Section 501(b) of the GLBA[37] directed the prudential banking agencies to establish standards for financial institutions they regulate relating to safeguards to (1) ensure the security and confidentiality of customer information; (2) protect against any anticipated threats or hazards to the security or integrity of such information; and (3) protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

In response to this directive, the agencies issued the "Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice," which they subsequently renamed the "Interagency Guidelines Establishing Information Security Standards."[38] The guidance addresses when a security incident requires an institution to notify its customers and what the notice should include.

Under the guidance, when an institution learns of an incident of unauthorized access to sensitive customer information, it should conduct a reasonable investigation to promptly determine the likelihood that the information has been or will be misused. If misuse of that information has occurred or is reasonably possible, the institution should notify the affected customers. The guidance defines *sensitive customer information* as name, address, or telephone number in conjunction with "the customer's Social Security number, driver's license number, account number, credit or debit card number, or a personal identification number or password allowing access to the customer's account. The term also includes any combination of components of customer information that would allow someone to log onto or access the customer's account, such as user name and password or password and account number.[39]

If the institution can identify only the customers whose information was misused or it is reasonably possible could be misused, it may limit notice to just those customers. However, if the institution is unable to identify the specific customers whose information has been accessed, and misuse of the information is reasonably possible, it should notify all customers in the group.

A notice should be provided in a clear and conspicuous manner and provide the following information:

- description of the incident in general terms including the type of customer information accessed or used;
- contact number for further information or assistance;
- list of actions taken to prevent further unauthorized access; and
- reminder to customers to remain vigilant for the next 12 to 24 months for potential identity theft and report such incidents to the financial institution, including the following actions:
    - recommend the customer review account statements for suspicious activity;
    - describe the ability to create a fraud alert on the customer's consumer report;
    - suggest customers periodically review their credit report from each of the three nationwide credit bureaus and note their ability to review them at no charge;
    - disclose the FTC's online resources to protect against identity theft and the ability to report an incident to the FTC.

Finally, the guidance states that notices should be delivered in any manner designed to ensure a customer can reasonably be expected to receive it.[40] This can include, for example, by telephone or mail, or by email for customers with a valid email address and who have agreed to receive communications electronically.

Right to Financial Privacy Act

Congress enacted the Right to Financial Privacy Act (RFPA) in 1978[41] to protect the privacy of customers' financial records by limiting the circumstances in which government agencies can access these records. In addition to establishing procedures that federal government authorities must follow when requesting a customer's financial records,[42] the RFPA also imposes requirements on financial institutions before they may release this information.[43]

Before the RFPA was enacted, bank customers were not informed when their financial records were disclosed to a government authority. In *United States v. Miller*, 425 U.S. 435 (1976), the Supreme Court held that a bank customer could not limit government access to his financial records because they were considered business records of the bank and not the private property of the individual. Congress passed the RFPA in response to the *Miller* decision.[44]

The RFPA stipulates that a government authority cannot access a consumer's financial records from a financial institution unless it is obtained in accordance with one of the following:[45]

- authorization from the customer, which includes the date and customer's signature, an authorization for disclosure for a period of no longer than three months, a statement that the customer may revoke at any time before the records are disclosed, an identification of the records to be disclosed, the purposes for which the information may be disclosed, and the customer's rights under the RFPA;
- a judicial subpoena;
- an administrative subpoena or summons;
- a search warrant; or
- a formal written request from the government authority (to be used if no administrative summons or subpoena authority is available).

The RFPA also generally requires that the requesting government authority provide the customer with a copy of the request on or before the date the request is made to the financial institution. The notice must include a description of the procedures that the customer should follow if he or she does not wish the records to be made available; specific disclosure language is provided in the RFPA.[46] A financial institution is prohibited from releasing a consumer's personal financial records unless the government authority certifies in writing that it has complied with the requirements of the RFPA.[47]

CONCLUSION

In the age of digital banking, proliferating data breaches, and consumer concerns about the privacy of their information, it is important that financial institutions comply with federal laws and regulations designed to protect the privacy and security of a consumer's data. Specific issues or questions should be discussed with your primary regulator. ■

Endnotes*

1 See Brooke Auxier et al., "Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information," Pew Research Center, November 2019.

2 See Federal Trade Commission "Equifax Data Breach Settlement," January 2020.

3 See the Gramm–Leach–Bliley Act, Pub L. 106–102, 113 Stat. 1338 (1999). The GLBA's privacy provisions are codified at 15 U.S.C. §§6801–6809 (as amended).

4 See 12 C.F.R. §1016.3(p).

5 See 12 C.F.R. §1016.4(a) and §1016.5(a).

6 See 12 C.F.R. §1016.4(a).

7 See 12 C.F.R. §1016.6(a)(6), §1016.10.

8 The exceptions, and any applicable requirements to qualify, are set forth in 12 C.F.R. §§1016.13, 14, and 15.

9 See 12 C.F.R. §1016.6.

10 See 12 C.F.R. §1016.6(a)(4).

11 See 12 C.F.R. §1016.8(b)(1).

12 See 12 C.F.R. §1016.8(b).

13 See 12 C.F.R. §1016.8(b)(2).

14 The Bureau partly addressed this issue in a 2014 amendment to Regulation P. 79 *Federal Register* 64057 (October 28, 2014). The FAST Act amendment went further than this amendment to reduce regulatory burden when an institution's privacy practices have not changed.

15 See Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

16 See §75001 of the FAST Act, adding §503(f) to the GLBA (codified at 15 U.S.C. §6803(f)).

17 See 83 *Federal Register* 40945 (August 17, 2018). The FAST Act amendment is implemented at 12 C.F.R. §1016.5(e).

18 See 12 C.F.R. §1016.5(e)(2).

19 Regulation V illustrates the preexisting relationship exception with an example to clarify its application in §1022.21(d)(1).

20 See 15 U.S.C. §1681s-3(a)(4).

21 See 12 C.F.R. §1022.21(a)(2)(emphasis added).

22 See 15 U.S.C. §1681s-3(a)(3)(A).

23 See 12 C.F.R. §1022.27(a).

24 See 12 C.F.R. §1022.23(b).

25 See 83 *Federal Register* at 40949.

26 See 15 U.S.C. §1681a(l).

27 See 15 U.S.C. §1681m(d).

28 See 15 U.S.C. §6802(e).

29 See Interagency Guidance at p. 4.

30 See Interagency Guidance at pp. 3–4.

31 See Interagency Guidance at p. 3.

32 See Pub. L. 115–174, 132 Stat. 1296 (2018).

33 The Senior Safe Act is codified at 12 U.S.C. §3423.

34 See EGRRCPA §215(b)(4) (codified at 42 U.S.C. §405B((b)4)).

35 See https://www.ssa.gov/dataexchange/eCBSV/.

36 See https://www.ssa.gov/dataexchange/eCBSV/.

37 See 15 U.S.C. §6801(b).

38 See 70 *Federal Register* 15736 (March 29, 2005). The agencies have also codified the guidance into their implementing regulations. For state member banks, the Federal Reserve has codified the guidance as app. D-2 to Regulation H, Subpart K, 12 C.F.R. Part 208; for bank holding companies, see 12 C.F.R. Part 225, app. F; for OCC-regulated institutions, see 12 C.F.R. Part 30, app. B; and for FDIC-regulated institutions, see 12 C.F.R. part 364, app. B.

39 See 70 *Federal Register* at 15752.

40 See 70 *Federal Register* at 15753.

41 See 12 U.S.C. §§3401 et seq.

42 See 12 U.S.C. §3402.

43 See 12 U.S.C. §3403.

44 H.R. Rep. 95-1383 at p. 34 (July 20, 1978) ("The [RFPA] is a Congressional response to the Supreme Court decision in *United States v. Miller* which held that a customer of a financial institution has no standing under the Constitution to contest government access to financial records.")

45 See 12 U.S.C. §3402.

46 See 12 U.S.C. §3408(4).

47 See 12 U.S.C. §3403(b).

* Note: The links for the references listed in the Endnotes are available on the *Consumer Compliance Outlook* website at consumercomplianceoutlook.org.

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Mortgage Servicers' Duties Under Regulation X to Respond to Notices of Error and Requests for Information

Mortgage Loan

The servicer requirements in subpart C[6] of Regulation X only apply to a *mortgage loan*, a subset of federally related mortgage loans, that is defined as a "federally related mortgage loan, as that term is defined in §1024.2 subject to the exemptions in §1024.5(b) but *does not include open-end lines of credit (home equity plans).*"[7]

Qualified Written Request (QWR)

RESPA defines *Qualified Written Request* (QWR) as written correspondence (excluding notices on a payment coupon or other payment medium the servicer supplied) that provides reasons that the borrower believes an error occurred or sufficient detail to make a request for information and includes information so that the servicer can identify the borrower's name and account from the information provided.[8]

In 2013, the Consumer Financial Protection Bureau (Bureau) significantly amended Regulation X to implement the Dodd–Frank Act amendments to RESPA.[9] The amendment retained the QWR requirement of responding to error notices and requests for information but expanded them and separately codified them: §1024.35 addresses error resolution procedures, while §1024.36 addresses requests for information. The Official Staff Commentary clarifies this change: "A qualified written request is just one form that a written notice of error or information request may take. *Thus, the error resolution and information request requirements in §§1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request.*"[10] The 2013 final rule also retained the prior exclusion of home equity plans from the servicing requirements in Subpart C, as noted previously.[11]

Small servicer

A small servicer is defined as a servicer, together with any affiliates, of 5,000 or fewer mortgages, a Housing Finance Agency, or a nonprofit entity servicing 5,000 or fewer mortgage loans for which it is the creditor.[12] The 2013 final rule generally exempted small servicers from the requirements in §§1024.38-41,[13] but not from the error resolution procedures and request for information requirements in §§1024.35 and 1024.36.[14]

Error notice versus request for information

A servicer must determine whether a borrower's written communication is an error notice, information request, or both. This distinction is important because the compliance requirements differ depending on the request. The regulation clarifies that servicers must focus on the *substance* of the communication:

> A servicer should not rely solely on the borrower's description of a submission to determine whether the submission constitutes a notice of error under §1024.35(a), an information request under §1024.36(a), or both. For example, a borrower may submit a letter that claims to be a *Notice of Error* that indicates that the borrower wants to receive the information set forth in an annual escrow account statement and asserts an error for the servicer's failure to provide the borrower an annual escrow statement. Such a letter may constitute an information request under §1024.36(a) that triggers an obligation by the servicer to provide an annual escrow statement. A servicer should not rely on the borrower's characterization of the letter as a *Notice of Error*, but must evaluate whether the letter fulfills the substantive requirements of a notice of error, information request, or both.[15]

ERROR RESOLUTION REQUIREMENTS (§1024.35)

Regulation X provides the legal framework for borrowers to submit notices to their servicer of a covered error related to the servicing of their mortgage, and the servicers' duties in responding.

Written notice requirements. Only written notices from the borrower or the borrower's agent[16] are subject to the error resolution requirements;[17] thus, oral borrower communications do not trigger these requirements.[18] In addition, the written notice must include the borrower's name, sufficient information to identify the borrower's mortgage loan account, and a description of the error the borrower believes has occurred. Written communications on payment coupons or on other payment forms do not qualify as error notices.[19]

Requiring specific addresses for notification. Servicers may require mortgage loan borrowers to send error notices and requests for information to a specific address, as long as the servicer provided written notice to the borrower of the address and lists it on any website of the servicer.[20] A servicer may accept error notices and information requests online but only in addition to receiving notices of error by mail.[21]

Covered errors. Regulation X defines the type of errors subject to the regulation, which we list in **Table 1: Covered**

TABLE 1: Covered Errors Under §1024.35(b)
1. Not accepting a conforming payment
2. Not applying an accepted payment to principal, interest, escrow, or other charges under the terms of the loan or applicable law
3. Not crediting a payment on date of receipt as required under §1026.36(c)(1)
4. Not timely paying taxes, insurance, or other charges servicer agreed to collect and pay per §1024.34(a) or refunding an escrow account balance per §1024.34(b)
5. Imposing a fee the servicer lacks a reasonable basis to impose
6. Not providing an accurate payoff statement under §1026.36(c)(3) when requested
7. Not providing accurate information regarding loss mitigation options and foreclosure per §1024.39
8. Not timely and accurately transferring servicing information to a transferee
9. Making the first foreclosure notice or filing in violation of §1024.41(f) or §1024.41(j)
10. Violating prohibition on foreclosure sale in certain circumstances under §1024.41(g) or (j)
11. Any other error relating to the servicing of a borrower's mortgage loan

Errors Under §1024.35(b). Comment 35(b)-1 clarifies that this does *not* include errors related to mortgage loan origination, underwriting, sale, or securitization. An error notice related to a decision to sell, assign, or transfer mortgage loan servicing is not covered unless the error relates to the servicer's failure to transfer accurate and timely information to a transferee servicer regarding a borrower's mortgage loan account, as stated in error 8 in Table 1.

Investigation and response requirements. A servicer has two options in responding to a written notice of a covered error. It can either 1) correct the error(s) the borrower identified and notify the borrower of the corrections made in accordance with the notice requirements discussed below, or 2) conduct a reasonable investigation, unless one of the investigation exceptions listed (**Table 4: Exceptions Under §1024.35(g)(1), (f)(2))** applies.[22]

If the servicer investigates and discovers a different and/or additional error, it must:

- correct the error(s);
- notify the borrower in writing of the error(s) identified;
- describe the action taken to correct them, including the effective date; and
- provide the servicers' contact information, including a telephone number.

The time frames for completing the investigation, which vary depending on the nature of the error and whether the borrower is in foreclosure, are listed in **Table 2: Investigation Time Frames**.

Requesting additional borrower information. A servicer may request more documentation than was submitted but cannot require a response as a condition for investigating the error. The servicer also cannot conclude an error did not occur without conducting a reasonable investigation, even if the borrower did not provide the requested information.[23]

Time Frames to Acknowledge Receipt of Error Notice and Conduct Investigation

Acknowledgment. The servicer must provide a written acknowledgment of receipt of the error notice within **five days** (excluding weekends and legal public holidays).[24]

TABLE 2: Investigation Time Frames[25]	
Error Type or Circumstance	**Resolution Time Limit***
Failure to provide an accurate payoff balance amount upon the borrower's request	Seven (7) days
Pending foreclosure, per in-scope errors 9 and 10, in Table 1	Prior to the foreclosure sale or 30 days, whichever is earlier
All other errors	Thirty (30) days
*Time frames begin when the error notice is received and exclude weekends and legal public holidays.	

Extending the error resolution time frame. For errors *not* related to a payoff statement, first notice or filing regarding foreclosure, or the prohibition on a foreclosure sale (see errors 6, 9, and 10), the servicer may extend the resolution time frame by 15 days, excluding weekends and legal public holidays. To extend the time frame, the servicer must notify the borrower of the extension in writing before the end of the 30-day period and state the reason for extending it.[26]

Multiple errors. If the error notice includes multiple servicing issues, a servicer may choose to apply different time frames for the allegations, as permitted.[27] For example, if an error notice asserts the servicer failed to provide an accurate payoff balance upon the borrower's request per §1024.35(b)(6), or imposed a fee improperly per §1024.35(b)(5), the servicer may choose to respond separately by responding to the first error notice no later than seven days after receiving it and responding to the second one no later than 30 days after receiving it. The servicer could also take steps to extend the resolution time frame for the second notice for an additional 15 days.

Completing the investigation. After the investigation, the servicer must notify the borrower of the resolution in writing, as shown in **Table 3: Completing the Investigation**:[28]

Documentation request. When a servicer determines no error occurred and the borrower requests copies of documents on which the servicer relied, the servicer must comply within 15 days after receiving the request (excluding weekends and legal public holidays) at no charge. The servicer does not have to provide confidential, proprietary, or privileged documentation and may instead state why it was not provided.[29]

Exceptions. The regulation contains three exceptions to the error notice acknowledgment and response requirements, as shown in **Table 4: Exceptions Under §1024.35(g)(1), (f)(2)**.

Prohibited practices. Servicers may not charge a fee or require a borrower to make a payment not yet due as a condition for responding to an error notice.[30] In addition, for 60 days after receiving the error notice, servicers may not report adverse information about an alleged payment error to a consumer reporting agency.[31] Except for covered errors in §1024.35(b)(9) and (10) (listed as errors 9 and 10 in Table 1), servicers can pursue applicable legal remedies during or after the error resolution process.[32]

REQUESTS FOR INFORMATION

A servicer must comply with any written requests for information related to servicing containing: (1) the name of the borrower, (2) information that enables the servicer to identify the borrower's mortgage loan account, and (3) information the borrower is requesting.

Written notice requirements. As with error notices, notices on payment coupons or other forms of payment provided by the servicer is not a request for information. A servicer may also establish an address for information requests, which must be the same address as that established for a notice of error. A servicer is not required to handle requests for payoff balances as information requests.[33]

Acknowledgment and timing requirements. After receiving a written information request, the servicer must follow specific acknowledgment, timing, and notice processes.[34]

Acknowledgment. As with error notices, the servicer must provide a written response acknowledging the information request within five days after its receipt (excluding weekends and legal public holidays).[35]

Responses and time frames. The time frame for responding to an information request is based on the type of information requested.

- If the borrower requested the identity, address, or other relevant contact information of the owner or assignee

TABLE 3: **Completing the Investigation**	
Investigation Result	**Notice Contents Required**
Asserted error occurred and is corrected	• Correction made • Effective date of correction • Contact information, including a telephone number, for obtaining further assistance Note: Under §1024.35(f)(1), if the servicer corrects an error and notifies the borrower of the correction in writing within five days (excluding weekends and holiday), some requirements do not apply
No error occurred	• The determination that no error occurred • Reason(s) for the determination • Borrower's right to request documents the servicer relied on in reaching the determination • How to request the documents the servicer relied on • Contact information, including a telephone number, for further assistance
Error different from asserted error occurred	• Error(s) identified • Action taken to correct the error • Effective date of the correction • Contact information, including a telephone number, for further assistance

TABLE 4: **Exceptions Under §§1024.35(g)(1), (f)(2)**
Duplicate error: when a borrower resubmits a previously addressed error notice, without providing new or material information
Overbroad error: when the servicer cannot reasonably determine the specific error alleged to have occurred; if a servicer can reasonably identify an error in an otherwise overbroad notice, the servicer follows §§1024.35(d), (e), and (i)
Untimely notice: a notice delivered more than one year after the servicing of the mortgage loan has been transferred to another servicer or the mortgage loan was discharged
Error before foreclosure sale: when the error pertains to the first notice or filing for foreclosure or a foreclosure order or sale received within seven days or fewer before a foreclosure, the §1024.35(d) and (e) requirements do not apply; instead, the servicer must make a good faith attempt to respond to the borrower orally or in writing

of the mortgage loan, the servicer must respond no later than **10 days** after receiving the request (excluding weekends and legal public holidays).

- For all other information requests, the servicer must respond no later than **30 days** after receiving the request (excluding weekends and legal public holidays).[36]

Extending the response time frame. The response time frame may *not* be extended if the request is for the identity, address, or other relevant contact information about the owner or assignee of the mortgage. For all other information requests, the time frame may be extended by 15 days (excluding weekends and legal public holidays); however, the servicer must notify the borrower of the extension and the reason(s) for the extension in writing before the end of the 30-day response period.[37]

> "Servicers may not assess a fee or require a payment that is owed as a condition of responding to the information request."

Requests from potential successors in interest. In 2016, the Bureau amended the requirements for responding to information requests from a potential successor in interest to a borrower's property because "it had received reports of servicers either refusing to speak to a successor in interest or demanding documents to prove the successor in interest's claim to the property that either did not exist or were not reasonably available."[38] The amendment requires servicers to acknowledge an information request indicating the requestor may be a successor in interest,[39] provided sufficient information is included to identify the mortgage loan.[40]

The servicer must acknowledge an information request in accordance with the time frames discussed previously. The servicer must also provide a notice that: (a) describes the documentation required to confirm successor's identity and ownership interest, and (b) provides contact information with telephone number for further assistance.[41] Alternatively, a servicer may send a combined acknowledgment and notice to the requestor within five days after receiving the request (excluding weekends and legal public holidays).[42]

If the response to the servicer's notice does not provide sufficient information to identify the requestor's identity and ownership interest, the servicer may:

- provide a response that includes examples of documents typically accepted to establish identity and ownership interest in a property;
- indicate the requestor may obtain a more individualized description of required documents by providing additional information;
- specify the additional information necessary to enable the servicer to identify the required documents; and
- provide contact information, including a telephone number, for further assistance.

If a potential successor in interest subsequently provides the required information specified by the servicer orally or in writing, the servicer must treat the new information, together with the original request, as a new, nonduplicative request, received as of the date the required information was received, and must respond accordingly.[43]

The responses provided to potential successors in interest do not have to provide any other information than specified previously.[44]

Completing the process (§1024.36(d)(1)). A servicer must respond to an information request as follows, depending on the circumstances:

- If the requested information is available, the servicer must provide it and contact information in writing.
- If the information is not available, the servicer must send the borrower a written notice stating:
    - the information is not available to the servicer,
    - the basis for the determination, and
    - contact information that includes a telephone number for further assistance.

A servicer may conclude requested information is unavailable after conducting a reasonable search. Comment 36(d)(1)(ii)-2 provides examples.

Exceptions (1024.36(f)). In **Table 5: Exceptions for Information Requests,** we list the exceptions for acknowledging and responding to information requests. For information requests subject to these exceptions, the servicer must still notify the borrower in writing that an exception applies and identify it. The notice must be provided no later than five days (excluding weekends and legal public holidays) after determining the exception applies.

TABLE 5: Exceptions for Information Requests	
Request Type	**Features**
Duplicative	Substantially the same as the request to which the servicer has already responded
Confidential, proprietary, or privileged	Contains confidential, proprietary, or privileged information
Irrelevant	Contains information not directly related to the borrower's mortgage loan
Overbroad/unduly burdensome	Request for an unreasonable volume of information or a request that would be impossible to respond to without exceeding the response time frames or incurring unreasonable costs relative to the circumstances
Untimely	Received over a year after mortgage servicing was transferred to another servicer or the mortgage loan was discharged

PROHIBITED PRACTICES

Servicers may not assess a fee or require a payment that is owed as a condition of responding to the information request.[45] However, a servicer may charge a fee for providing a beneficiary notice under applicable state law. Unlike error notices, a request for information does not affect furnishing information to the consumer reporting agencies or pursuing allowable remedies provided in the loan agreement.[46]

SOUND PRACTICES

A prior *Outlook* article titled "Mortgage Servicing: Managing Change"[47] discussed sound servicing practices for managing change that also apply here:

- Maintain error resolution and information request policies and procedures that align with the complexity of mortgage servicing operations.
- Provide adequate staff training that includes written procedures, where needed.
- Develop internal controls and reviews for error resolution and information requests.
- Remember that, if you use a third-party mortgage loan servicer, your institution remains responsible for vendor compliance and risk management.
- Inform borrowers of servicer written error resolution and information request procedures in advance so they are aware of where to address error notices and information requests.
- Review error notices and requests for information to monitor how mortgage loan servicing policies and procedures are affecting consumers.

CONCLUSION

As COVID-19 mortgage forbearances and moratoriums expire, servicers may see an increase in error notices or information requests from borrowers. It is important servicers' compliance management systems are able to timely acknowledge, investigate, and comply with Regulation X. Specific issues should be discussed with your primary regulator. ■

Endnotes*

[1] See https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-of-2020-data-on-mortgage-lending/. The Bureau noted that an additional 432,000 loans were originated in 2020 where institutions did not specify whether originations were closed-end or open-end.

[2] The Federal Reserve publishes this information as part of the data it collects on "Financial Accounts Guide" (Households and nonprofit organizations; one- to four-family residential mortgages liability as of Q1 2021).

[3] See Scott Sonbuchner, "Error Resolution and Liability Limitations Under Regulations E and Z: Regulatory Requirements, Common Violations, and Sound Practices," and Scott Sonbuchner, "Error Resolution and Liability Limits for Prepaid Accounts and Foreign Remittance Transfers." Both articles were published in *Consumer Compliance Outlook* Issue 2 2021.

[4] See 12 C.F.R. §1024.2(b).h.

[5] See 12 C.F.R. §1024.5(b) (exemptions to RESPA and Regulation X).

[6] See 12 C.F.R. §§1024.30-41.

[7] See 12 C.F.R. §1024.31 (emphasis added).

[8] See 12 U.S.C. § 2605(e)(1)(B).

[9] See 76 *Federal Register* at 10696 (February 14, 2013).

[10] See Comment 31(a)(10)-2 (emphasis added).

[11] See 76 *Federal Register* at 10721 ("The Bureau believes it is necessary and appropriate at this time not to apply the requirements in subpart C to open-end credit (home equity lines).")

[12] See 12 C.F.R. §1026.41(e)(4).

[13] See 12 C.F.R. §1024.30(b)(1).

[14] A small servicer is also subject to the prohibition on foreclosure referral in §1024.41(f). See 12 C.F.R. §§1024.30(b)(1) and 1024.41(j).

[15] See Regulation X, Comment 2 for definition of Qualified Written Request in §1024.31.

[16] See Comment 1024.35(a)-1 that identifies the process a servicer may use to verify if someone claiming to be the borrower's agent has authority to act on the borrower's behalf.

[17] See 12 C.F.R. §1024.35(a).

[18] See 12 C.F.R. §1024.35(a).

[19] See 12 C.F.R. §1024.35(a).

[20] See 12 C.F.R. §1024.35(c).

[21] See Comment 35(c)-4.

[22] See 12 C.F.R. §1024.35(e).

[23] See 12 C.F.R. §1024.35(e)(2).

[24] See 12 C.F.R. §1024.35(d).

[25] See 12 C.F.R. §1024.35(e)(3)(i).

[26] See 12 C.F.R. §1024.35(e)(3)(ii).

[27] See Comment 35(e)(3)(ii)-1.

[28] See 12 C.F.R. §1024.35(e)(1).

[29] See 12 C.F.R. §1024.35(e)(4).

[30] See 12 C.F.R. §1024.35(h).

[31] See 12 C.F.R. §1024.35(i)(1).

[32] See Comment 35(h)-1 and §1024.35(i)(2).

[33] See 12 C.F.R. §1024.36(a) & (b).

[34] Per 12 C.F.R. §1024.36(e), these time frames do not apply if the servicer provides in writing the requested information to the borrower as well as contact information that includes a telephone number for further assistance within five days after receiving the request (excluding weekends and holidays).

[35] See 12 C.F.R. §1024.36(c).

[36] See 12 C.F.R. §1024.36(d)(2)(i).

[37] See 12 C.F.R. §1024.36(d)(2)(ii).

[38] See 81 *Federal Register* at 72,160, 72,165 (October 19, 2016).

[39] Requests for information from the agent of a potential successor in interest are also subject to these provisions. See Comment 36(i)-2.

[40] See 12 C.F.R. §1024.36(i)(1).

[41] See 12 C.F.R. §1024.36(i)(1).

[42] See 12 C.F.R. §1024.36(e). Section 4.6.4 of the Bureau's *Small Entity Compliance Guide* for Regulation X clarifies that this applies to successors in interest.

[43] See 12 C.F.R. §1024.36(i)(2).

[44] See 12 C.F.R. §1024.36(d)(3).

[45] See 12 C.F.R. §1024.36(g).

[46] See 12 C.F.R. §1024.36(h).

[47] See Katie Ringwald, "Mortgage Servicing: Managing Change" *Consumer Compliance Outlook* (Fourth Issue 2020).

* Note: The links for the references listed in the Endnotes are available on the *Consumer Compliance Outlook* website at consumercomplianceoutlook.org.

Temporary Rule Under Regulation X to Help Mortgage Borrowers Affected by the COVID-19 Pandemic

On June 30, 2021, the Consumer Financial Protection Bureau (Bureau) issued a temporary final rule under Regulation X[1] to help mortgage borrowers facing financial hardship from the COVID-19 pandemic.

The rule has two main provisions: 1) it requires servicers to follow procedural safeguards before initiating a foreclosure; and 2) it allows servicers to offer loss mitigation options based on an incomplete application. The rule also modifies existing early intervention live contact messages and reasonable diligence obligations. In the preamble, the Bureau noted that nearly 900,000 borrowers could be exiting forbearances by the end of 2021.[2] The rule, which became effective on August 31, 2021, is designed to help ensure a smooth and orderly transition as other foreclosure protections end by providing borrowers with a meaningful opportunity to explore ways to resume making payments and avoid foreclosure.

The protections provided in the rule are temporary. The rule generally sunsets on January 1, 2022. A provision that specifies live contact requirements related to borrowers experiencing a COVID-19-related hardship expires on October 1, 2022.[3]

> "The Bureau noted this approach will help mitigate a resource strain on servicers processing a large volume of mitigation applications ..."

PROCEDURAL SAFEGUARDS

These provisions apply to a mortgage loan secured by a borrower's principal residence, which was more than 120 days delinquent on or after March 1, 2020, and for which the statute of limitations under state law applicable to the foreclosure action being taken will not expire before January 1, 2022.

Under §1024.41(f)(3)(ii), servicers (except small servicers) cannot make the first notice or filing to initiate a foreclosure on such mortgage loans unless one of the following circumstances applies:

- the borrower submitted a complete loss mitigation application, remained delinquent since submitting it, and the servicer determined the borrower is ineligible for loss mitigation; the borrower rejected options that were offered; or the borrower failed to perform under a loan modification agreement;
- the property securing the mortgage is considered abandoned under state or local law; or
- the servicer conducted specified outreach to the borrower, and the borrower is deemed unresponsive under the rule.

LOSS MITIGATION OPTIONS FOR INCOMPLETE APPLICATIONS

The final rule also permits servicers to offer loss mitigation options based on an incomplete application in certain circumstances. Servicers are generally required to receive a *complete* loss mitigation application before they can offer loss mitigation options (aka the anti-evasion requirement).[4] To help borrowers whose forbearance agreements expire in 2021, the final rule permits servicers receiving an incomplete application to offer a loss mitigation option that meets the following requirements:

- the loan term is not extended by more than 40 years from the date of the loan modification;
- the loan principal and interest payments do not increase over the amount paid before the modification;
- interest does not accrue on any portion of the amount owed if the modification permits the borrower to delay payment on those amounts until the loan is refinanced, the property is sold, the mortgage term ends, or (for FHA loans) the mortgage insurance terminates;
- the modification is made available to borrowers experiencing a COVID-19-related hardship (as defined in §1024.31);

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Temporary Qualified Mortgage for Government-Sponsored Enterprise Loans Effectively Ended in July

Recent announcements from the government-sponsored enterprises (GSEs) affect the Consumer Financial Protection Bureau's (Bureau) extension of the temporary qualified mortgage (QM) definition for loans eligible for purchase or guarantee by a GSE while under conservatorship (QM Patch).

In 2013, when the Bureau issued a final rule[1] under Regulation Z to implement the ability-to-repay (ATR) and QM requirements of the Dodd–Frank Act, it created a temporary QM definition to facilitate transition to the new rule and to avoid disrupting the mortgage market's recovery from the financial crisis.[2] The Bureau defined the temporary QM, which is also known as the GSE or QM Patch, to include any mortgage *eligible* to be purchased or guaranteed by the GSEs while under conservatorship and meeting certain other statutory QM requirements.[3] As many lenders have experience selling mortgages to the GSEs, the QM Patch eased the transition to Regulation Z's ATR requirements.

The Bureau scheduled the QM Patch to sunset on January 10, 2021, the date by which the Bureau expected residential lenders seeking QM status for their loans would transition to the General QM definition.[4] But the Bureau found through its statutorily required assessment of the ATR/QM rule[5] that lenders still relied heavily on the QM Patch, in part because of the General QM's requirement of using Appendix Q of Regulation Z to verify debts and income, which lenders found opaque.[6] The Bureau also noted that the 43 percent debt-to-income (DTI) limit for the General QM would make it more difficult for certain creditworthy borrowers with DTI ratios greater than 43 percent to obtain mortgages once the QM Patch expired, which has no DTI limit.

To address these concerns, the Bureau amended its General QM definition to eliminate the Appendix Q and 43 percent DTI requirements.[7] The Bureau replaced the 43 percent DTI limit with a priced-based approach: For most first-lien mortgage loans with loan amounts of $110,260 or more (indexed for inflation), the annual percentage rate cannot exceed the average prime offer rate by 225 basis points or more.[8] Higher price thresholds exist for certain manufactured housing loans, subordinate-lien loans and loans in smaller amounts.

The final rule also replaces the Appendix Q requirement for verifying debts and income with a more flexible approach, including a safe harbor for lenders that use certain verification standards of the GSEs or certain federal agency lenders.[9]

This final rule became effective on March 1, 2021, and originally carried a July 1, 2021, mandatory compliance date. However, on April 30, 2021, the Bureau extended the mandatory compliance date for the General QM to October 1, 2022, citing the effect of the pandemic and other concerns.

> "Accordingly, the guidance provides that QM Patch loans must have application dates on or before June 30, 2021 ..."

This also extended the sunset date for the Patch QM from July 1 to October 1, 2022, because the sunset date was tethered to the mandatory compliance date of the amended General QM.

In spring 2021, the GSEs issued new guidance to address the requirements of their recently amended Senior Preferred Stock Purchase Agreement (PSPAs) with the U.S. Department of the Treasury, which they originally entered into in 2008 in exchange for financial support during the financial crisis. This guidance specifies that the GSEs may only purchase loans that meet the revised criteria of the Bureau's General QM rule that became effective on March 1, 2021, with a July 1, 2021, compliance date. Accordingly, the guidance provides that QM Patch loans must have application dates on or before June 30, 2021, and be purchased or securitized on or before August 31, 2021.[10] The guidance also explained that for single-closing construction-to-permanent loans, the application date must be on or before June 30, 2021, and the purchase or securitization date must be on or before February 28, 2022.

This new GSE guidance effectively ended the QM Patch on July 1, 2021, despite the Bureau's actions to extend its availability to October 1, 2022. The Bureau acknowledged this development in its April 30, 2021, final rule, stating "[t]he Bureau recognizes that the practical availability of the Temporary GSE QM loan definition may be affected by policies or agreements created by parties other than the Bureau, such as the … PSPAs, which include restrictions on GSE purchases that rely on the Temporary GSE QM loan definition after July 1, 2021."[11] However, the Bureau also recently discussed this issue in its most recent unified agenda (Spring 2021 Unified Agenda), stating that loans eligible under the QM Patch would continue to have QM status regardless of the purchase requirements set by the GSEs.

Endnotes*

1 See 78 *Federal Register* 6408 (January 30, 2013).

2 See 78 *Federal Register* at 6533-34.

3 See §1026.43(e)(4) (2020 annual edition of C.F.R.).

4 See 78 *Federal Register* at 6506.

5 On January 10, 2019, the Bureau issued the Ability-to-Repay and Qualified Mortgage Rule Assessment Report (ATR/QM Report), as required by the Dodd-Frank Act for its significant rules.

6 See the ATR/QM Report at 190-94.

7 See 85 *Federal Register* 86308 (December 29, 2020).

8 *APOR*, which is defined in §1026.35(a)(2), is a benchmark of the average annual percentage rate currently offered to consumers for mortgage transactions with low-risk pricing characteristics. The Bureau publishes tables with recent APORs.

9 See Comment 43(e)(2)(v)(B)-3.

10 See Fannie Mae Lender Letter 2021-11 and Freddie Mac Bulletin 2021-19, which also reference their earlier guidance on this issue.

11 See 86 *Federal Register* at 22844, 22851 (April 30, 2021).

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Compliance Alert: Temporary Rule Under Regulation X to Help Mortgage Borrowers Affected by the COVID-19 Pandemic

- Either the borrower's acceptance of an offer ends any preexisting delinquency on the mortgage loan or 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 servicer does not charge fees regarding the loan modification and waives all existing late charges, fees, and penalties incurred on or after March 1, 2020.

The Bureau noted this approach will help mitigate a resource strain on servicers processing a large volume of loss mitigation applications, while still protecting consumers because streamlined options must conform to the previously-noted restrictions. The Bureau further noted that borrowers experiencing the effects of the COVID-19 emergency may be less likely to finish a complete loss mitigation application, which could put them at risk for foreclosure.[5]

Endnotes*

1 See 86 *Federal Register* at 34848 (June 30, 2021).

2 See 86 *Federal Register* at 34852.

3 See 12 C.F.R. §1024.39(e).

4 See 12 C.F.R. §1024.41(c)(2)(i). An interim final rule issued in June 2020 temporarily permits mortgage servicers to offer certain loss mitigation options based on the evaluation of an incomplete loss mitigation application for borrowers experience a COVID-19 financial hardship. 85 *Federal Register* 39055 (June 30, 2020). The new rule expands on the temporary exception.

5 See 86 *Federal Register* at 34868.

* Note: The links for the references listed in the Endnotes are available on the *Consumer Compliance Outlook* website at consumercomplianceoutlook.org.

News From Washington: Regulatory Updates*

The Consumer Financial Protection Bureau (Bureau) issues interpretive rule under Regulation Z addressing the effect of the Juneteenth federal holiday on two mortgage rules. On June 17, President Joseph Biden signed the Juneteenth National Independence Day Act (Pub. L. 117–17) into law, which designated June 19, 2021, as a new federal holiday. On August 12, 2021, the Bureau published an interpretive rule in the *Federal Register* to clarify whether creditors should treat June 19 as a federal holiday or a business day for the purposes of certain compliance timing requirements under Regulation Z, including the right of rescission for a closed-end mortgage and certain provisions in the TILA RESPA Integrated Disclosure (TRID).[1] The Bureau also noted that if Juneteenth falls on a Saturday, as it did in 2021, an *observed* federal holiday the preceding Friday is still considered a business day under the regulation.

Because the Juneteenth holiday was signed into law on the afternoon of June 17, 2021 (two days before the 2021 official date of the holiday), the Bureau issued guidance on June 18, 2021, to address concerns that financial institutions had insufficient time to adjust their systems to recognize the new holiday for compliance purposes.

In response to the Bureau's guidance on this issue, the Federal Reserve issued CA letter 21-12 on September 3, 2021, to discuss its supervisory expectations for the effect of the Juneteenth Federal Holiday on certain provisions of Regulation Z. The CA letter states that "the Federal Reserve does not intend to cite a violation in an examination or initiate an enforcement action due to compliance issues that arose out of the implementation period for the new federal holiday." The Federal Reserve supervises state member banks with $10 billion or less in consolidated assets for compliance with Regulation Z.

Agencies issue a statement on interagency action for Community Reinvestment Act (CRA) modernization. On July 20, 2021, the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Comptroller of the Currency (OCC) released a statement on the status of CRA modernization, noting that they "are committed to working together to jointly strengthen and modernize regulations implementing the [CRA]. The agencies have broad authority and responsibility for implementing the CRA. Joint agency action will best achieve a consistent, modernized framework across all banks to help meet the credit needs of the communities in which they do business, including low- and moderate-income neighborhoods."

In addition, Federal Reserve Board Governor Lael Brainard issued a statement supporting an interagency rulemaking: "We are delighted to work together to develop a joint Notice of Proposed Rulemaking building on the Board's September 2020 Advance Notice of Proposed Rulemaking, which was intended to provide a framework for a joint rulemaking that ensures the CRA remains a strong and effective tool to address inequities in access to credit and meet the needs of low- and moderate-income communities and garners broad support."

Agencies issue proposed guidance on managing the risk of third-party relationships. On July 19, 2021, the agencies published proposed interagency guidance in the *Federal Register* on managing third-party risk for the institutions they supervise. If adopted, the guidance would replace the agencies' existing individual guidance, including the FDIC's *Guidance for Managing Third-Party Risk* (2008), the OCC's *Third-Party Relationships: Risk Management Guidance* (2013), and the Board's *Guidance on Managing Outsourcing Risk* (2013). The preamble notes that third parties can provide significant benefits and advantages to banking organizations — for example, helping to use innovative technology. But the use of third parties also creates risks. The guidance is intended to help banking organizations identify and manage these risks throughout the risk management life cycle.

The proposed guidance addresses many third-party issues, including:

- reviewing the importance of employing a risk-based approach to managing third-party relationships, including comprehensive and rigorous oversight for critical activities;
- providing a framework for developing practices to manage all life cycle stages of a third-party relationship;
- reiterating that a third party does not diminish an organization's obligation to comply with applicable consumer protection laws and regulations; and
- stating that the agencies may, if the circumstances warrant, examine a third party's ability to comply with applicable consumer laws and regulations, including fair lending and unfair or deceptive acts or practices, and may pursue appropriate corrective measures.

The proposal sought comments on 18 questions. The comment period closed on September 17, 2021. The Board also provided a memo that staff prepared for the Governors.

Agencies release a list of distressed or underserved nonmetropolitan middle-income geographies. On June 25, 2021, the Board and FDIC announced the availability of the 2021 list of distressed or underserved nonmetropolitan middle-income geographies. These are geographic areas where revitalization or stabilization activities are eligible to receive CRA consideration under the *community development* definition. The agencies apply a one-year lag period for geographies that were listed in 2020 but are no longer designated as distressed or underserved in the current release. Revitalization or stabilization activities in these geographies are eligible to receive CRA consideration for 12 months after publication of the current list.

Bureau issues interpretive rule to resume examinations of the Military Lending Act (MLA). On June 23, 2021, the Bureau published an interpretive rule to revisit its prior position that it was not authorized to conduct MLA compliance examinations. The rule clarifies that the Bureau has the authority under the Dodd–Frank Act (DFA) to conduct MLA examinations of large banks, savings associations, credit unions, and certain nonbanks under its supervisory jurisdiction. The Bureau began conducting MLA compliance examinations in 2013. However, it discontinued them in 2018 because it believed it could only examine institutions for compliance with "Federal consumer financial laws," a term defined in the DFA that does not include the MLA. In 2019, the Bureau asked Congress to amend the MLA to provide this authority.

The interpretive rule clarifies that the Bureau can conduct MLA examinations under §§1024 and 1025 of the DFA. These sections authorize the Bureau to conduct examinations of very large banks, credit unions, savings associations, and certain nonbanks *not only* for compliance with federal consumer financial laws, *but also* for the purposes of "detecting and assessing associated risks to consumers and to markets for consumer financial products and services." Because under the Bureau's interpretation, violations of the MLA pose significant risks to consumers that are associated with activities subject to federal consumer financial laws, the Bureau concluded it has the legal authority to conduct MLA examinations. The Bureau's interpretive rule recognizes the role of the prudential regulators in conducting MLA examinations and notes that applicable statutes grant the prudential regulators broad supervisory and examination powers, which the regulators use for various purposes, including assuring the safety and soundness of supervised institutions, assuring compliance with laws and regulations at those institutions, and other purposes.

On a related note, the U.S. Department of Defense (DoD), which has rulemaking authority for the MLA, published an interpretive rule on February 28, 2020, in the *Federal Register* to withdraw a prior interpretation. The MLA generally applies to consumer credit transactions, with certain defined exceptions, including an exception for the financing of the purchase of personal property secured by the property being purchased. The DoD issued an initial set of interpretations that included questions-and-answers relating to this exception in August 2016. In December 2017, the DoD expanded the Q&As to encompass the purchase of motor vehicles as well as the purchase of personal property. Subsequent to the publication of the December 2017 interpretations, the DoD received requests to reconsider the amended Q&A. With this issuance, the DoD is withdrawing the December 2017 version of the Q&A and is reverting to the August 2016 version to allow the DoD to conduct additional analysis on this issue. The current version of the Q&As clarifies that a hybrid loan providing both purchase money *and* a cash advance is not expressly intended to finance the purchase of personal property because the loan provides additional financing unrelated to the purchase. Therefore, this type of transaction does not qualify for the coverage exception under the MLA to purchase personal property secured by the property being purchased. The interpretive rule issued in February 2020 also added a new Q&A regarding the use of an Individual Taxpayer Identification number when an individual does not possess a Social Security number.

Endnote

[1] The Bureau noted that "other provisions of Regulation Z rely on the specific business-day definition and therefore were also affected by the legislation. Those provisions are outside the scope of this interpretive rule." 86 *Federal Register* at 44267, 44268 fn 5 (August 12, 2021).

* Links to the announcements are available in the online version of *Outlook* at consumercomplianceoutlook.org.

FAIR CREDIT REPORTING ACT (FCRA)

Supreme Court holds that a plaintiff with inaccurate information in his credit report that is not disclosed to third parties lacks standing because there is no concrete harm. *TransUnion v. Ramirez,* 141 S. Ct. 2190 (2021). The plaintiff sought to buy a car at a dealership, which obtained his credit report from TransUnion. The dealership declined to sell him a car because, he was told, his name appeared on a terrorist list. The dealership subscribed to TransUnion's OFAC Name Screen Alert, which flagged those whose first and last names match names on a list of the Office of Foreign Assets Control (OFAC) of persons deemed to be threats to national security, such as terrorists and drug traffickers. TransUnion used third-party software to compare consumers' names with the OFAC list, which only matched names on the list without conducting additional validation, such as matching Social Security numbers and birthdates. Thus, the plaintiff matched a name on the OFAC list, but it was a different person. After the denial, the plaintiff obtained his credit report from TransUnion, which did not show the OFAC listing. TransUnion subsequently mailed him a second report showing the listing but did not provide a required disclosure of his rights under the FCRA.

The plaintiff's lawsuit against TransUnion alleged FCRA violations 1) in failing to follow reasonable procedures to assure the "maximum possible accuracy" of his credit report because the software only matched names without additional validation, 2) in not providing the OFAC information in the first credit report provided, and 3) in not providing the statutory summary of rights in the second report with the OFAC information. The U.S. District Court for the Northern District of California then certified a class of 8,185 persons whose credit reports incorrectly flagged them as matching persons on the OFAC list for a class-action lawsuit. Within this class, 1,853 class members' reports were distributed to third parties, while the reports of the other 6,332 class members were not shared. A jury awarded more than $60 million in damages, which a divided panel of the Ninth Circuit affirmed, but reduced to around $40 million.

On appeal, the Supreme Court focused on the threshold issue whether the class members met standing requirements for the three FCRA claims. The court noted that standing is limited to real, concrete injuries, and not abstract ones. This requirement was satisfied for class members whose reports were disseminated to third parties because the information affected their reputation by falsely suggesting they were terrorists or criminals, similar to a defamation claim for injuring someone's reputation with false information. But class members whose reports were *not* disseminated lacked standing because "the mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm." The plaintiffs also argued injury for the risk of *future* harm, but the court found this claim was too speculative. Finally, the court rejected standing for the other two claims: that TransUnion provided the first report without including the OFAC information and provided a second report with the information but lacking the FCRA disclosure. The court characterized these issues as formatting errors because the required information was provided, but it was provided in two separate reports instead of a single report, as the FCRA requires. The court found the plaintiffs failed to submit evidence they suffered any harm from this formatting error and therefore lacked standing. The case was remanded.

Seventh Circuit clarifies a consumer reporting agency is not required to make legal determinations when investigating consumer disputes. *Chuluunbat v. Experian Info. Sols., Inc.,* 4 F.4th 562 (7th Cir. 2021). The plaintiffs incurred credit card debt that was later sold to third parties. When the purchaser creditors attempted to collect the debts, the plaintiffs filed disputes with the three consumer reporting agencies (CRAs), alleging these creditors did not own the debts. The CRAs contacted the purchaser creditors, which confirmed ownership, but did not produce the original sale or assignment agreements. The CRAs then notified the plaintiffs that no further steps would be taken to investigate their disputes. The plaintiffs' lawsuits alleged the CRAs violated §§1681e(b) and 1681i of the FCRA because their investigation was inadequate. The court noted that 15 U.S.C. §1681e(b) requires CRAs to "follow reasonable procedures to assure maximum possible accuracy" of information in credit reports and to conduct reasonable reinvestigations to determine if the information is inaccurate if consumers dispute information in their report.

The court explained that a threshold issue is whether the dispute concerns a factual inaccuracy or legal issue, but it also noted the line between them is not always clear. The court contrasted clear factual issues, such as the amount a consumer owes and the date a consumer opened an account or incurred a payment, with clear legal issues, such as whether a debt is invalid because of a legal violation. The court concluded "the central question is whether the alleged inaccuracy turns on *applying* law to facts or simply *examining* the facts alone. Consumer reporting agencies are competent to make factual determinations, but they do not reach legal conclusions like courts and other tribunals do." The court found that whether the plaintiffs' debts were assigned to other parties requires a legal determination "which the consumer reporting agencies are not statutorily required to do." Accordingly, the court affirmed the dismissal of the cases.

FAIR DEBT COLLECTION PRACTICES ACT

Eleventh Circuit holds that a debt collector transmitting debtor information to a third-party vendor violates the Fair Debt Collection Practices Act. *Hunstein v. Preferred Collection & Management Services, Inc.*, 994 F.3d 1341 (11th. Cir. 2021). The plaintiff alleged a debt collector violated the Fair Debt Collection Practices Act (FDCPA) by sharing information about the debt — the plaintiff's name, the outstanding balance, the nature of the debt as a medical bill for his son's medical treatment, and his son's name — with a third-party vendor retained to print and mail a debt collection letter. Section 1692c(b) of the FDCPA prohibits debt collectors, with exceptions not relevant here, from communicating consumers' personal information to third parties "in connection with the collection of any debt."

The district court dismissed the case. On appeal, the Eleventh Circuit reversed and remanded. The court identified the following two issues: 1) whether the plaintiff suffered an injury that provided legal standing, and, if so, 2) whether the debt collector violated the FDCPA by improperly sharing the consumer's information with a vendor in connection with collecting a debt.

The court found standing was established because the plaintiff's claim was similar to the tort of invasion of a person's privacy, which is actionable, and because the FDCPA identifies invading individual privacy as one of the harms it seeks to address. With respect to whether sharing information with the vendor violated the FDCPA, the court concluded that sharing the plaintiff's status as a debtor, the amount of his debt, the creditor to whom the debt was owed, and the purpose for which the debt was incurred concerning his son's medical treatment, were all tied to collecting the plaintiff's debt and therefore was a violation. The case was remanded.

The court noted that its ruling "may well require debt collectors (at least in the short-term) to in-source many of the services that they had previously outsourced, potentially at great cost." However, the court concluded: "Our obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensible or desirable. Needless to say, if Congress thinks that we've misread §1692c(b) — or even that we've properly read it but that it should be amended — it can say so."

Regulation P Sharing Exception

This decision does not affect financial institutions' information sharing practices under Regulation P, which permits an institution under 12 C.F.R. §1016.13(a) to disclose nonpublic personal information to a nonaffiliated third party to perform services for the institution if the initial privacy notice is provided, and the third party enters into an agreement prohibiting it from disclosing or using the information other than to perform its functions.

* Links to the court opinions are available in the online version of *Outlook* at consumercomplianceoutlook.org.

Regulatory Calendar

Effective Date or Proposal Date†	Implementing Regulation	Regulatory Change
10/01/22	Reg. Z	Final rule to extend the sunset date for the temporary Government-Sponsored Enterprise (GSE) QM loan definition
01/01/22	Reg. C	Final rule establishing 200 loans as the permanent Home Mortgage Disclosure Act (HMDA) data reporting threshold for open-end lines of credit
11/30/21	Reg. F	Final rule creating implementing regulations for the Fair Debt Collection Practices Act
09/17/21	CRA	Office of the Comptroller of the Currency (OCC) issues rulemaking proposal to rescind its June 2020 CRA modernization rule and replace it with future interagency CRA modernization rule
09/01/21	Reg. B	Consumer Financial Protection Bureau (Bureau) issues §1071 rulemaking proposal for lenders to collect and report data on small business credit applications, including women- and minority-owned businesses
08/31/21	Reg. X	Temporary rule requiring servicers to follow procedural safeguards before they can initiate foreclosure until 1/1/22 and allowing loss mitigation on certain incomplete applications
08/12/21	Reg. Z	Interpretive rule: Impact of the 2021 Juneteenth Holiday on certain closed-end mortgage requirements
07/19/21	N/A	Proposed Interagency Guidance on Third-Party Relationships: Risk Management
06/23/21	MLA	Bureau interpretive rule for authority to conduct Military Lending Act examinations

† Because proposed rules do not have an effective date, we have listed the *Federal Register* publication date.

Common Authentication Solution Adopted

The Federal Reserve and the other members of the Federal Financial Institutions Examination Council (FFIEC) recently completed a project that identified opportunities to reduce regulatory burden for community banks (i.e., supervised institutions with $10 billion or less in consolidated assets). One element of the project was resolving the differing and cumbersome authentication requirements that FFIEC member agencies use to allow supervised institutions to access an agency's externally facing supervision systems.

As a result of this project, the FFIEC members adopted **login.gov**, a secure authentication solution that provides supervised institutions and FFIEC members with a single sign-on method for government websites, including access to their supervision systems. While login.gov can be used by all supervised institutions, it is especially helpful for smaller institutions. Users will now have a consistent and less confusing experience when they log in to the various FFIEC members' systems. Additionally, because the number of access methods will be reduced, users will not need to maintain multiple credentials to access different FFIEC members' systems, thereby creating a more seamless experience.

Login.gov, which is supported by the General Services Administration, adheres to the latest security standards established by security organizations such as the National Institute of Standards and Technology. Further, this single sign-on solution provides a high degree of security with privacy, multifactor authentication for access, and end-to-end encryption within the platform. In addition, login.gov allows organizational independence so that all FFIEC members may manage access to their own data.

Each FFIEC member will establish their own implementation strategy and timeline for transitioning supervised institutions and their staff to login.gov. Therefore, supervised institutions should contact their primary regulator with any questions about login.gov and when they should use this new access platform.

FFIEC members will continue to evaluate opportunities to align their technological capabilities wherever possible to promote consistency among members and to reduce regulatory burden on supervised institutions.

Supervision Central Is Here

Effective supervision relies on strong collaboration between banking agencies and supervised institutions. Over the years, a growing need for better ways to exchange data outpaced the technology used for supervisory activities. To address this need, the Federal Reserve launched Supervision Central in June 2021. Supervision Central is a centralized tool to facilitate secure data intake, sharing, and collaboration among supervisory staff, bank staff, and other agencies' staff for safety and soundness and consumer compliance activities at community and regional banking organizations supervised by the Federal Reserve.

Supervision Central is designed to reduce regulatory burden for supervised institutions by providing an easy way to submit documents and information to the Federal Reserve. Data submitted will be reusable across examinations with the goal of reducing the volume of duplicate information requests from the Federal Reserve by making documents previously provided more readily available to supervisory staff.

Also, supervised institutions will no longer need to submit the same documents to multiple banking agencies for joint examinations and other supervisory activities because the agencies will be accessing the same documents.

The first phase of Supervision Central laid the foundation by replacing the legacy technology used for supervisory events and ongoing supervision. New features that provide value to all users have been added since the launch and will continue to be added based on user feedback. Your continued feedback on Supervision Central is welcome. If you have comments or questions on Supervision Central, please contact your central point of contact or the examiner-in-charge of your supervisory event. In the future, you will be able to submit your feedback directly to supervisory staff.

The Supervision Central help site contains useful resources to better understand the functionality available, including recordings of live training sessions that were offered in June 2021. You can access the help site by visiting www.supervisioncentral.org.

How to Subscribe to *Consumer Compliance Outlook* and Outlook Live

Outlook and Outlook Live are both Federal Reserve System outreach platforms provided at no charge. *Outlook* is a quarterly newsletter focusing on federal consumer compliance topics, while Outlook Live is a webinar series focusing on consumer compliance topics.

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Suggestions, comments, and requests for back issues are welcome in writing, by telephone (215-574-6500), or by email (outlook@phil.frb.org). Please address all correspondence to:

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2021 Calendar of Events

November 17–19	**2021 Financial Stability Conference: Planning for Surprises, Learning from Crises** Virtual Conference, Federal Reserve Bank of Cleveland
December 2–3	**The FDIC's 20th Annual Bank Research Conference** Arlington, VA The event may be held virtually or as a hybrid, as necessary.

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