



**Comments submitted by the Center for American Progress  
to the Consumer Financial Protection Bureau**

**RE: 2012 Real Estate Settlement Procedures Act (Regulation X)  
Mortgage Servicing Proposal**

**Docket No. CFPB-2012-0034  
RIN 3170-AA14**

*October 9, 2012*

The Center for American Progress respectfully submits this response to the Consumer Financial Protection Bureau's (CFPB) proposed rulemaking on mortgage servicing standards under the Real Estate Settlement Procedures Act (RESPA). We appreciate the opportunity to provide input on rules that impact the lives of homeowners, the health of neighborhoods, and the financial position of investors.

The Center for American Progress (CAP), founded in 2003, is a progressive, nonpartisan think tank dedicated to improving the lives of Americans through ideas and action. Julia Gordon, CAP's Director of Housing Finance and Policy, previously served as the manager of single-family policy at the Federal Housing Finance Agency. In that position, she oversaw the implementation of the Servicing Alignment Initiative (SAI), an effort that aligned and improved the servicing practices of the Enterprises, and she provided information about SAI to parties to the National Mortgage Settlement crafting the provisions of the settlement related to the loss mitigation process.

Providing comprehensive servicing standards for all mortgage servicers is one of the CFPB's most important functions. While bad lending practices and risky products triggered the housing crisis, the abject failure of the mortgage servicing industry to mitigate losses or to follow the law when pursuing foreclosures greatly exacerbated the damage done to homeowners, communities, the housing market, and the larger economy.

This comment letter focuses on the three overarching points about which we are most concerned. We also have worked with the Center for Responsible Lending and the Consumer Federation of America to develop more comprehensive comments about loss mitigation, which will be submitted under separate cover.

- 1. The key to successful loss mitigation is helping the consumer before the foreclosure starts and before any "dual track" begins. For this reason, the CFPB should establish a defined pre- and post-foreclosure period as a core loss mitigation process requirement and also should require a special review before initiating foreclosure.**

As the CFPB notes in the preamble to the servicing proposal, early intervention is the key to successful loss mitigation. Helping consumers *prior to the start of the foreclosure process* (and even prior to default, when default is reasonably foreseeable) saves money for investors and homeowners alike and is far more likely to result in an affordable, sustainable modification or other alternative to foreclosure.

For early intervention to work, however, homeowners must have an opportunity to be reviewed for loss mitigation before the servicer sends the file to a third party to initiate foreclosure proceedings. Realistically speaking, servicers exercise significantly less control over the subsequent proceedings after such referral. The late fees and arrearages that begin to accrue at the inception of delinquency also begin to accrue much more quickly after foreclosure is initiated because they are compounded by attorney fees and other foreclosure-related charges.

When developing the SAI, FHFA and the GSEs placed a very high priority on providing homeowners and servicers with a set period of time during which outreach and loss mitigation review could take place. The SAI provides a standard 120-day period after delinquency before there is any possibility of a homeowner going to foreclosure --- and consequently, before there is any possibility of a "dual track" process. Dual-tracking, which refers to a servicer's attempt to conduct loss mitigation while at the same time proceeding with steps toward foreclosure, is a widely criticized practice that confuses homeowners and reduces the likelihood of successfully avoiding foreclosure.

During this "pre-foreclosure" period, GSE servicers first reach out to delinquent homeowners by phone and then by mail if necessary. The mailing includes the information a borrower needs to apply for a loan modification, unemployment forbearance, a short sale approval, or any other form of assistance. If the homeowner submits a complete or "substantially complete" application prior to the expiration of the 120-day grace period, the servicer must review the submission prior to initiating foreclosure. If the servicer offers the borrower a loss mitigation option, the servicer must wait an additional 14 days for a response from the borrower.

SAI also offers another layer of protection before foreclosure: a mandatory review to ensure that the servicer adequately reached out to the borrower and appropriately reviewed any application for assistance. This review helps to avoid unnecessary foreclosures, an extremely important goal for this CFPB rulemaking. (In simple terms, an "unnecessary" foreclosure is a foreclosure that happens even though the homeowner desires an alternative to foreclosure that would save the investor money.) Preventing unnecessary foreclosures while permitting necessary foreclosures

to proceed, such as those on abandoned homes or on strategically defaulting homeowners, meets the CFPB's interest in protecting consumers while also ensuring that the mortgage system works for mortgage investors. Indeed, a system that effectively distinguishes between necessary and unnecessary foreclosures will result in shorter foreclosure timelines and reduced severities.

The parties to the National Mortgage Settlement recognized the usefulness of a defined pre-foreclosure period and a mandatory review when they adopted the overall structure of the SAI foreclosure process as part of that settlement.

For this reason, CAP urges the CFPB to institute defined pre- and post-foreclosure periods (preferably mirroring the same timelines used in SAI and National Mortgage Settlement) as well as a mandatory review prior to initiating foreclosure to ensure loss mitigation efforts have taken place.

**2. The best way to improve servicing standards is to make the process as similar as possible across all servicers and books of business.**

No matter how good any servicing standards look on paper, they will only work if mortgage servicers and the general public understand what the standards are, how they work, and in what situations they apply. The best way to ensure broad understanding of the rules is to try to have as much uniformity as possible across the industry.

After the housing bubble burst, many homeowners lost their homes unnecessarily because they did not understand what rules governed the servicing of their mortgage and because their servicers provided them with incorrect information (in many cases, through ignorance or confusion rather than malfeasance). For example, over the past five years, servicers have repeatedly (and incorrectly) told thousands of homeowners that they had to default on their mortgage in order to obtain assistance. In the vast majority of cases, the servicing rules permitted homeowners to obtain loan modifications prior to default if they were at imminent risk of default, yet neither homeowners nor mortgage servicing employees were aware of those rules. Consequently, these homeowners stopped paying their mortgage as instructed, thereby accruing arrearages and late fees that in many cases rendered them much harder to help when the loss mitigation actually took place.

In another example, many homeowners with private-label mortgages could not get accurate information from their servicer about loan modifications because each trust's Pooling and Servicing Agreement (PSA) contained its own set of servicing standards. With so many different standards out there, servicing employees defaulted to the most onerous standards across the board. In many cases, they told homeowners that their investor did not permit a modification, even though the individual PSA clearly stated otherwise.

We acknowledge that the CFPB cannot impose identical, detailed standards across the board for all servicers and investors (who at this time are subject to a variety of standards stemming from the Making Home Affordable Program, the OCC Consent Orders, the National Mortgage Settlement, and other settlements or arrangements). But CFPB can certainly adopt the same basic structure that applies to the GSEs and the parties to the National Mortgage Settlement. The CFPB's decision not to follow those process standards as closely as possible squanders a key opportunity to make the system more transparent and understandable.

One final note on this topic relates to the timing of required communication by the servicer. SAI and the National Mortgage Settlement require a letter to go out in the 31-35 day time period after delinquency (except if the servicer uses a behavioral model that indicates the borrower is a chronic late-payer) and then another letter in the 61-65 day time frame. The CFPB has chosen to require a letter at 40 days after delinquency. Since there is nothing cited in the CFPB's reasoning to explain why 40 days is preferable to a similar time frame, CAP recommends that the CFPB stick with the 31-35 day and 61-65 day requirements. This would make it easier for servicers and eliminate the need for repeated contact with borrowers who are chronic late-payers but at low risk of default.

**3. Failure to review a loan for foreclosure should constitute an error for the purposes of error resolution requirements.**

Given the importance of loss mitigation and uniform processes surrounding foreclosure, it is of the utmost importance that homeowners have the ability to object if servicers do not follow the rules. In response to the question posed in the proposed rule, CAP believes that a failure to perform a loss mitigation review should constitute an "error" for the purposes of error resolution requirements.

Moreover, we are concerned that by narrowing the definition of "error" to a limited universe of situations, the CFPB runs the risk of solving only yesterday's problems, without leaving adequate flexibility to address problems that may arise under the new standards. For this reason, we believe the category should include some kind of "catch-all" provision that enables a borrower to cite to any errors that have contributed to an unnecessary or improper foreclosure.

**Conclusion**

We commend the CFPB for addressing the critical issue of loss mitigation standards in this comprehensive rulemaking. We support many of the provisions in this proposed rule, including the 30-day period for reviewing a completed application for assistance and the availability of an appeal process for those who believe they were unfairly denied access to a foreclosure alternative. In addition, we would support an exemption for smaller servicers, the specifics of

which are discussed in the joint comment with the Center for Responsible Lending and Consumer Federation of American.

If promulgated with the additions and substitutions we have recommended here, the proposed rules will provide significant protection against another industry failure like the one that caused so much harm over the past several years. However, we should also stress the significance of getting the loss mitigation standards right. If the CFPB cannot address the above concerns prior to the planned finalization of the more comprehensive rulemaking, we would support having the loss mitigation provisions withdrawn and re-issued at a later date.

Thank you again for your hard work on this most important issue. If you have any questions on these comments, please feel free to contact Julia Gordon at [jgordon@americanprogress.org](mailto:jgordon@americanprogress.org) or (202) 478-5324.