

## Sample RESPA Notice of Error for Dual Tracking Violations

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An important new borrower right, effective January 10, 2014, may require a mortgage servicer to cancel or postpone a foreclosure sale when the servicer initiated the foreclosure while still evaluating the homeowner for loss mitigation options or during the 120-day pre-foreclosure waiting period. The borrower or the borrower's agent may assert this right by sending a notice of error to the servicer. Under the Regulation X provision implementing 12 U.S.C. § 2605(e) of the Real Estate Settlement Procedures Act, a written inquiry that asserts an error by the servicer with respect to the borrower's mortgage loan is referred to as "notice of error." The sample notice of error provided below can be used to challenge and seek correction of dual tracking violations under the Regulation X loss mitigation rule, with several variations depending on the nature of the servicer's violation.

For most notices of error, a servicer must acknowledge the request within 5 business days of receipt, and respond within 30 business days of receipt.<sup>1</sup> Of even greater significance, if the borrower or borrower's agent sends a written notice of error that is received by the servicer more than 7 days before a scheduled foreclosure sale and the notice asserts certain violations of the dual tracking provisions of the loss mitigation procedures, the servicer must respond prior to the date of a foreclosure sale or within 30 business days after the servicer receives the notice of error, whichever is earlier. To qualify as this type of notice of error, the notice must assert that the servicer either:

- initiated a foreclosure before the 120th day of delinquency in violation of Regulation X § 1024.41 (f) or (j), which is a covered error under Regulation X § 1024.35(b)(9), or
- moved for a foreclosure judgment or conducted a foreclosure sale in violation of Regulation X § 1024.41(g) or (j), which is a covered error under Regulation X § 1024.35 (b)(10).

Thus, if the servicer receives this notice of error more than 7 days before a scheduled foreclosure sale, the servicer may have to cancel or postpone the sale in order to comply with the error notice response requirements.<sup>2</sup> If the servicer receives this notice of error 7 or less days before a scheduled foreclosure sale, a servicer is not required to comply with the response obligations but must make a good faith attempt to respond to the borrower, orally or in writing,

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<sup>1</sup> Reg. X, 12 C.F.R. § 1024.35(d) and (e).

<sup>2</sup> Reg. X, 12 C.F.R. § 1024.35(e)(3)(i)(B) and § 1024.35(f)(2); Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 35(e)(3)(i)(B)-1.

and either correct the error or state the reason the servicer has determined that no error has occurred.<sup>3</sup>

For a detailed discussion of the RESPA requirements for notices of error, *see* § 9.2.2 of NCLC's *Foreclosures* (4th ed. 2012 and 2013 Supp.).

Advocates should check that the address they use in preparing the notice is one given by the servicer for notices of error, and not assume that the address used by the client to send monthly payments is the proper designated address.<sup>4</sup> If the notice is sent by an attorney on behalf of a client, it should include a written authorization from the client similar to that provided below.<sup>5</sup> Appropriate alterations based on your clients' situation must be made before sending the following sample notice:

[*date*]

[*Mortgage servicer*]

[*Address*]

Attn: Borrower Inquiry Department

Re: [*Borrowers' name, address, account number*]

To Whom it May Concern:

Please be advised that I represent [*borrowers*] with respect to the mortgage loan you are servicing on the property located at [*address*]. My clients have authorized me to send this request on their behalf (see Authorization below). As servicer of my client's mortgage loan, please treat this as a "notice of error" pursuant to the Real Estate Settlement Procedures Act, subject to the response period set out in Regulation X, 12 C.F.R. § 1024.35(e)(3)(i)(B).

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<sup>3</sup> Reg. X, 12 C.F.R. § 1024.35(f)(2).

<sup>4</sup> Borrower written inquiries (including notices of error) under the RESPA must be sent to the "designated" address for receipt and processing of such inquiries, if the servicer has properly designated such an address. *See* Reg. X, 12 C.F.R. § 1024.35(c); § 9.2.2.3 of NCLC's *Foreclosures* (4th ed. and 2013 Supp.). The servicer's website should be checked for the designated address.

<sup>5</sup> A servicer is required to respond to a request for information that is sent by the borrower or the borrower's agent. 12 U.S.C. § 2605(e)(1)(A). However, a servicer may require that the borrower or agent provide documentation, such as an authorization, that the agent has authority to act on the borrower's behalf. *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 36(a)-1 (effective Jan. 10, 2014); § 9.2.2.4 of NCLC's *Foreclosures* (4th ed. and 2013 Supp.).

***[Alternative A – violation of § 1024.41(f)(1)]***

You have asserted that my clients' mortgage account became delinquent beginning on [date]. On [date], you initiated a foreclosure proceeding against my clients by *[filing a court action, sending a notice of sale, etc.]*. This action was taken when my clients' mortgage account was less than 120 days delinquent, in violation of Regulation X, 12 C.F.R. § 1024.41(f)(1) *[or Regulation X, 12 C.F.R. § 1024.41(j) if the servicer is a "small servicer." ]*.

To correct this error, you should immediately *[cancel the scheduled foreclosure sale and any related legal advertisement of the sale, or dismiss or move to dismiss the foreclosure court action filed against my clients]*.

***[Alternative B – violation of § 1024.41(f)(2)]***

In [month/year], my clients submitted to you a complete loss mitigation application. This complete application was received by you *[during the 120-day pre-foreclosure review period provided for under Regulation X, 12 C.F.R. § 1024.41(f)(1) or before you initiated foreclosure by making the first notice or filing]*. However, on [date], you initiated a foreclosure proceeding against my clients by *[filing a court action, sending a notice of sale, etc.]*. This action was taken *[even though my clients have not received a notice pursuant to Regulation X, 12 C.F.R. § 1024.41(c)(1)(ii) stating the outcome of your evaluation of their application; or prior to the time my clients' appeals rights expired; or even though my clients have not received a notice pursuant to Regulation X, 12 C.F.R. § 1024.41(h)(4) stating the outcome of their appeal of your denial of a loan modification option; or before my clients had rejected the loss mitigation option you offered them; or even though my clients have not failed to perform under the loss mitigation agreement you entered into with them]*, in violation of Regulation X, 12 C.F.R. § 1024.41(f)(2).

To correct this error, you should immediately *[cancel the scheduled foreclosure sale and any related legal advertisement of the sale, or dismiss or move to dismiss the foreclosure court action filed against my clients]*.

***[Alternative C – violation of § 1024.41(g)]***

In [month/year], my clients submitted to you a complete loss mitigation application. This complete application was received by you more than 37 days before the foreclosure sale you scheduled on their home. However, on [date], the law firm representing you in the foreclosure proceeding moved for a foreclosure judgment or order of sale *[including making a dispositive motion, such as a motion for default judgment, judgment on the pleadings, or summary judgment]*. This action was taken *[even though my clients have not received a notice pursuant to Regulation X, 12 C.F.R. § 1024.41(c)(1)(ii) stating the outcome of your evaluation of their application; or prior to the time my clients' appeals rights expired; or even though my clients have not received a notice pursuant to Regulation X, 12 C.F.R. § 1024.41(h)(4) stating the outcome of their appeal of your denial of a loan modification option; or before my clients had rejected the loss mitigation option you offered them; or even though my clients have not failed to perform under the loss mitigation agreement you entered into with them]*, in violation of Regulation X, 12 C.F.R. § 1024.41(g).

To correct this error, you should immediately instruct the law firm representing you in the foreclosure proceeding to take all necessary actions to avoid the issuance of a foreclosure judgment or order of sale [*or vacate any foreclosure judgment or order of sale*].<sup>6</sup>

Thank you for taking the time to respond to this notice of error.

Very truly yours,

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[*attorney*]

### **Authorization to Release Information**

To: [*servicer*]

Re: Borrowers: [*name of borrowers*]  
Account No: [account no.]  
Property Address: [*address*]

We are represented by the law office of [*name of firm*] and attorney [*name of attorney*] concerning the mortgage on our home located at [*address*]. We hereby authorize you to release any and all information concerning our mortgage loan account to the law office of [*name of firm*] and attorney [*name of attorney*] at their request. We also authorize you to discuss our case with the law office of [*name of firm*] and attorney [*name of attorney*].

Thank you for your cooperation.

Very truly yours,

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[*borrower 1*]

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[*borrower 2*]

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<sup>6</sup> If a servicer conducts a foreclosure sale in violation of Regulation X, 12 C.F.R. § 1024.41(g), the borrowers have a direct cause of action for violation of the regulation and may pursue remedies available under 12 U.S.C. § 2605(f). See NCLC's Foreclosures, § 9.2.10 (4th ed. and 2013 Supp.).

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