Overview of Michigan's Mortgage Foreclosure Process – as of June 19, 2014

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(a project of Michigan Poverty Law Program)

I. Pre-Foreclosure Process –
Consumer Financial Protection Bureau (CFPB) Rules – Regulation X

II. Foreclosure Process –
Michigan Foreclosure by Advertisement Statute, MCL 600.3201 et seq

I. Pre-Foreclosure Process – Consumer Financial Protection Bureau (CFPB) Rules – Real Estate Settlement Procedures Act – RESPA Loss Mitigation Rules – Regulation X, 12 CFR §§ 1024.39; 1024.40; 1024.41

A. CFPB issued new regulations implementing RESPA – Regulation X – effective January 10, 2014

B. RESPA Loss Mitigation Rules set out requirements and timelines before foreclosure can be initiated.

1) Early Intervention – Reg. X, 12 CFR § 1024.39
2) Continuity of Contact – Reg X, 12 CFR § 1024.40
3) Loss Mitigation Procedures – Reg X, 12 CFR § 1024.41

C. **Early Intervention – Reg. X, 12 CFR § 1024.39**

1) **Live Contact: No later than the 36th day of delinquency**, a servicer shall establish or make good faith efforts to establish "live contact" with the borrower.

   a) "Live contact" includes telephoning or conducting in-person meeting with the borrower, but not leaving a recorded phone message
   b) Purpose of the contact – to provide opportunity to discuss the borrower's delinquency
   c) Servicer should inform the borrower about the availability of loss mitigation options, if appropriate
   d) Delinquency begins on the day a payment is due and unpaid

2) **Written Notice: No later than the 45th day of delinquency,** a servicer must provide the borrower with written notice containing information about available loss mitigation options.

a) Servicer is not required to give this notice more than once during any 180-day period

b) Written notice must include:

- Statement encouraging the borrower to contact the servicer
- Telephone number for "continuity of contact" personnel and servicer's mailing address
- Brief description of examples of available loss mitigation options
- Application instructions or general statement such as "contact us for instructions on how to apply"
- The website to access either the CFPB list or the HUD list of homeownership counselors and the HUD toll-free telephone number to access homeownership counselors

D. **Continuity of Contact – Reg. X, 12 CFR § 1024.40**

1) Servicer must have policies and procedures reasonably designed to ensure that:

a) A single person or a team of personnel is assigned to borrower no later than the 45^{th} day of delinquency
b) Assigned personnel are available by telephone to respond to the borrower's inquiries and assist with available loss mitigation options
c) Assigned personnel provide the borrower with accurate information about loss mitigation options

E. **Loss Mitigation Procedures – Reg. X, 12 CFR § 1024.41**

1) **<u>Pre-Foreclosure Review Period – 120 days</u>:** A servicer shall not make "the first notice or filing" to initiate the foreclosure process until the borrower's mortgage loan obligation is more than 120 days delinquent. 12 CFR § 1024.41(f)(1)

- In Michigan, a non-judicial foreclosure is initiated by the "earliest document required to be recorded or published." *See Official Bureau Interpretations – 41(f)(1)(ii) – Prohibition on foreclosure referral.*

2) **<u>Loss Mitigation Application</u>**

a) **<u>Application Submitted Before a Foreclosure Sale</u>:**

- If a loss mitigation application is received 45 days or more before a foreclosure sale, servicer must:
  - promptly review the loss mitigation application to determine whether the application is complete;

  - within 5 business days of receiving application, provide written notice to borrower that:
    - acknowledges receipt of the application and notifies the borrower whether the application is complete or incomplete, or
    - describes documents and information needed to complete the application, and
    - provides "reasonable date" by which borrower should submit the documents and information necessary to make the loss mitigation application complete.

- If servicer receives a complete loss mitigation application more than 37 days before foreclosure sale, the servicer must within 30 days of receipt:
  - evaluate the borrower for all loss mitigation options available to the borrower; and
  - provide the borrower with written notice as to which loss mitigation options, if any, is being offered to borrower.

  - The servicer shall include in this written notice the amount of time the borrower has to accept or reject the offer.
  - If denial of loan modification, the written notice shall include specific reasons for the servicer's decision for each option available to the borrower; and
    that the borrower has the right to appeal the denial of any loan modification option and the time to appeal.

- **Borrower's Response**: If a complete loss mitigation application is received 90 days or more before a foreclosure sale, the servicer may require that the borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the offer is made.

- If a complete loss mitigation application is received less than 90 days but more than 37 days before a foreclosure sale, the servicer may require that the borrower accept or reject offer no earlier than 7 days after the offer is made.

- If the borrower requests an appeal, the deadline for accepting the loss mitigation option is extended until 14 days after the servicer provides the appeal determination notice.

- **Appeal Rights**:

  - Borrower must request an appeal within 14 days after servicer provides initial notice of determination
  - To exercise appeal rights, the borrower must submit completed application 90 days or more before a scheduled foreclosure sale or during the 120-day pre-foreclosure review period

- The appeal is reviewed by “different personnel than those responsible for evaluating” the loss mitigation application
- The servicer must decide the appeal and provide notice of determination to the borrower within 30 days of appeal request.

b) **<u>Dual Tracking</u>:**

● Servicers must not make first notice or filing required for foreclosure process until mortgage loan is more than 120 days delinquent

- If the borrower submits a complete loss mitigation application during 120-day period or before the servicer has made first notice or filing to initiate the foreclosure process, the servicer shall not make first notice or filing to initiate the foreclosure process

- If borrower submits a complete application after the first notice or filing but more than 37 days before foreclosure sale, the servicer shall not conduct the foreclosure sale, unless:

  a) it has sent a written denial, and either 14-day appeal period has run or is not applicable, or appeal is denied; or
  b) the borrower rejects all loss mitigation options offered; or
  c) the borrower failed to perform under an agreed option

F. Exemptions – Reg. X, 12 CFR § 1024.30(b); § 1024.41(j)

- Loss mitigation procedures apply only to a mortgage that is secured by the borrower’s principal residence.

- Small servicers are required to comply with the 120-day pre-foreclosure waiting period, and shall not make first notice or filing to initiate the foreclosure process before the borrower is more than 120 days delinquent.

- Small servicers shall not make first notice or filing to initiate the foreclosure process or conduct a foreclosure sale, if the borrower is performing under a loss mitigation agreement

- Small servicers are exempt from all other loss mitigation procedures.

- Servicers are exempt from all loss mitigation procedures with respect to reverse mortgage transactions.

II. Foreclosure Process – Michigan Foreclosure by Advertisement Statute, MCL 600.3201 et seq

A. In Michigan there are two methods to foreclose: 1) Judicial Foreclosure – MCL 600.3101 et seq and 2) Foreclosure by Advertisement – MCL 600.3201 et seq. A judicial foreclosure is rarely used by the lender.

B. Requirements to Foreclose by Advertisement:

● To foreclose by advertisement, the mortgage must contain a power of sale clause. MCL 600.3201. A power of sale provision gives the lender the power to sell the property when the borrower defaults.

● There must be a default under the terms of the mortgage that triggers the "power of sale" clause. MCL 600.3204(1)(a).

● There is no pending court action to recover the debt secured by the mortgage. MCL 600.3204(1)(b).

● The mortgage and any assignments have been properly recorded. MCL 600.3204(1)(c) and MCL 600.3204(3).

● The party foreclosing is either the owner of the indebtedness or the servicing agent of the mortgage. MCL 600.3204(1)(d).

C. Notice and Publication Requirements

● The foreclosure notice must be published for 4 successive weeks at least once a week, in a newspaper published in the county where the property is located. If no newspaper is published in the county, the notice shall be published in a newspaper in an adjacent county. MCL 600.3208.

● A copy of the notice must be posted in a conspicuous place upon any part of the premises within 15 days of the first publication. MCL 600.3208.

- ▫ No requirement to post the notice on the house itself. *Cox v Townsend*, 90 Mich App 12 (1979).
- ▫ No requirement to mail, personally serve, or otherwise notify the borrower in any other manner. *Jennings v Arnold*, 258 Mich 599 (1935).

● The notice of foreclosure must contain the following information:

- ▫ Names of the mortgagor, the original mortgagee, and the foreclosing assignee.
- ▫ The date of the mortgage and the date the mortgage was recorded.
- ▫ The amount claimed to be due on the mortgage on the date of the notice.
- ▫ A description of the premises.

▫ Length of the redemption period. MCL 600.3212

● Note: Section 3212 does not require notice of the time and place of the sale. However, most notices contain that information.

● The foreclosing party may adjourn the sale on a weekly basis by posting a notice of adjournment at the auction site. If the adjournment is for more than a week, the foreclosing party must publish a notice in the same newspaper as the original notice, within 10 days from the date the sale was adjourned, and again once per week for each week the sale is adjourned. MCL 600.3220.

D. Foreclosure Sale

● The sale must be public and held between 9:00 a.m. and 4:00 p.m. in the same building as the circuit court for the county where the property is located. The sale is conducted by the sheriff, deputy sheriff or a person appointed to conduct the sale. The property is sold to the highest bidder. MCL 600. 3216.

● The mortgagee may purchase the property at the foreclosure sale. MCL 600.3228.

● The purchaser will receive a sheriff's deed. The sheriff's deed transfers legal title to the property subject to the borrower's redemption right. The borrower may redeem the property to void the sheriff's deed. MCL 600.3232 and MCL 600.3240.

● After the sale, any surplus proceeds are paid to any subsequent mortgagee or lien holder pursuant to MCL 600.3252. If there are none, the surplus proceeds are paid to the borrower.

● If after the sale, there is a deficiency, the mortgagee may bring an action against the borrower to recover the deficiency. The borrower can defend against the deficiency by showing that the property sold was fairly worth the amount of the debt secured by it at the time and place of the sale or that the amount bid was substantially less than its true value. MCL 600.3280.

E. Redemption Period

● After the sale, the borrower continues to have the right of possession of the property until after the redemption period expires.

● The redemption period varies from 1 year to 30 days. MCL 600.3240 and MCL 600.3241.

▫ For residential property, the redemption period is 6 months from the date of the sheriff's sale, if the amount due on the mortgage is more than 2/3 of the original indebtedness secured by the mortgage.

▫ For residential property, the redemption period is 1 year, if the amount due on the mortgage is less than 2/3 of the original indebtedness secured by the mortgage.
▫ For residential property, the redemption period is 6 months from the date of the sheriff's sale, if the amount due on the mortgage is more than 2/3 of the original indebtedness secured by the mortgage and the property is more than 3 acres and not used for agricultural purposes.
▫ For residential property, the redemption period is 1 year, if more than 3 acres and is being used for agricultural purposes.
▫ The redemption period is shortened to 30 days for abandoned properties if the mortgagee complies with the statutory procedures under MCL 600.3241.

● A borrower can redeem the property by paying the amount that was bid at the sale plus interest at the same rate as the mortgage, taxes and insurance. MCL 600.3240.

F. Inspection Rights During Redemption Period – MCL 600.3237; MCL 600.3238; MCL 600.3278

● After the foreclosure sale, the purchaser at the sale has the right to inspect the exterior and interior of the homeowner's property and all ancillary structures after the sale and periodically throughout the redemption period.

1) After Sheriff's Sale – Home Inspections

a) **Exterior Inspections** – the purchaser of the sale may conduct exterior inspections of the home throughout the redemption period.

- No notice required
- No initial baseline inspections
- No limit on the number of exterior inspections during the redemption period

b) **Interior Inspections (MCL 600.3237)** – after the foreclosure sale, if the purchaser intends to conduct an interior inspection, the purchaser must send an initial notice to the mortgagor and any other person that has possession of the property that contains the following:

- The identity of the purchaser
- The contact info for the purchaser
- The date of the sale, the amount of the sale, and the estimated date the redemption period expires
- The details of the purchaser's right to inspect
- How the mortgagor can surrender the property
- Statement that if mortgagor intends to vacate the property at any time after the sale, the mortgagor must notify the purchaser in advance (10 days in advance), and if the mortgagor does not notify

the purchaser, the mortgagor may risk heightened liability for damage to the property.

- Notice is provided via certified mail, posting, or any other method reasonably calculated to achieve actual notice.

c) **Interior Inspections (MCL 600.3238)** – after the foreclosure sale and after the purchaser has provided the written notice under section 3237, the purchaser may inspect the property.

Initial Interior Inspections:

- The purchaser may conduct an initial inspection of the interior of any structures on the property.
- Before conducting the interior inspection, the purchaser (in addition to providing the section 3237 notice) must notify the mortgagor of the purchaser's intent to inspect the property.
- Notice shall be provided via certified mail, posting, or any other method reasonably calculated to achieve actual notice.
- The notice shall be provided at least 72 hours in advance and shall set the time of the inspection at a reasonable time of day, in coordination with the mortgagor if possible.

Subsequent Interior Inspections:

- After the initial inspection, the purchaser may request that mortgagor provide information or evidence of the condition of the interior of the property, in any form reasonably necessary to assess the condition of the property.
- Purchaser shall not make that request "more than once in a calendar month or more often than 3 times in any 6 months of the redemption period" unless there is reasonable cause to believe that damage is imminent or has occurred.
- If the mortgagor refuses to provide information within 5 business days after receipt of the request or the information provided reveals damage has occurred or is imminent, the purchaser may schedule an interior inspection of the property.
- For this inspection, the purchaser must provide a notice to inspect at least 72 hours in advance and shall set the time of the inspection at a reasonable time of day, in coordination with the mortgagor if possible.
- If the mortgagor provides the information and there is no evidence of damage, the purchaser shall not conduct an interior inspection

d) **Summary Proceedings**

- If the mortgagor unreasonably refuses the inspection or if damage is imminent or has occurred, purchaser may immediately begin summary proceedings for possession of the property or file an action for any other relief necessary to protect the property from damage.

- Before commencing summary proceedings, the purchaser shall provide notice to mortgagor of the purchaser's intent to commence summary proceedings if the damage or condition causing the damage is not repaired or corrected within 7 days after receipt of the notice.
- Notice shall be provided via certified mail, posting, or any other method reasonably calculated to achieve actual notice.
- The purchaser shall not begin summary proceedings if 1) the damage or condition causing the damage is repaired or corrected within the 7-day period; or 2) the mortgagor and the purchaser agree to a timeline to complete repair or correct the condition causing the damage.

- **Judge's Consideration:**

  - In determining whether to enter judgment for possession, the judge shall consider the totality of the circumstances surrounding the damage or condition causing the damage, including, but not limited, to the following:

    (a) The cause of the damage or condition.
    (b) Whether the mortgagor has taken appropriate steps to repair the damage or correct the condition and to secure the property from further damage.
    (c) Whether the mortgagor has promptly contacted the purchaser and any property insurer regarding the damage or condition.
    (d) Whether any delay in repairs or corrections is affirmatively caused by the purchaser or the property insurer.

- If a judgment for possession is granted the right of redemption is extinguished

e) **Definition of Damage**

- **"Damage"** includes, but is not limited to the following:

(a) The failure to comply with local ordinances regarding maintenance of the property or blight prevention, ….
(b) an exterior condition that presents a significant risk to the security of the property or significant risk of criminal activity occurring on the property.
(c) stripped plumbing, electrical wiring, siding, or other metal material.

(d) missing or destroyed structural aspects or fixtures, including, but not limited to, a furnace, water heater, air conditioning unit, countertop, cabinetry, flooring, wall, ceiling, roofing, toilet, or any other fixtures.
(e) Deterioration below, or being in imminent danger of deteriorating below, community standards for public safety and sanitation.
(f) A condition that would justify recovery of the premises under [Michigan's summary proceedings].

f) **Rebuttable Presumption (MCL 600.3278)**

a) If the purchaser has provided notice of intent to inspect under section 3237, and the mortgagor intends to move, the mortgagor must notify the purchaser at least 10 days before vacating the property so that the purchaser can secure the property.

- Notice shall be provided via electronic mail, certified mail, or any other method reasonably calculated to achieve actual notice.

b) If the purchaser has provided notice of intent to inspect under section 3237, there is a rebuttable presumption that the mortgagor is liable to the purchaser for all damage to the property that occurs before the expiration of the redemption period, if the mortgagor:

- Fails to consent to the initial inspection
- Fails to comply with the request for information on the condition of the property or consent to an inspection of the property after the initial inspection
- Fails to provide timely notice that mortgagor intends to vacate the property
- Fails to surrender control of the property in a manner that reasonably provides the purchaser with the opportunity to secure the property

c) If the purchaser has provided notice of intent to inspect under section 3237, there is a rebuttable presumption that the mortgagor is not liable for damage to the property that occurs after the mortgagor surrenders control of the property if the mortgagor:

- Consents to an initial inspection
- Complies with a request for information on the condition of the property, and consents to inspections of the property after the initial inspection, if requested.
- Provides timely notice to the purchaser that the mortgagor intends to vacate the property
- Surrenders control of the property in a manner that reasonably provides the purchaser with the opportunity to secure it.