Emory Law Journal

Volume 63 | Issue 1 Article 4

2013

Regulation X: A New Direction for the Regulation of Mortgage Servicers

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REGULATION X: A NEW DIRECTION FOR THE REGULATION OF MORTGAGE SERVICERS

ABSTRACT

Mortgage servicers are responsible for handling the day-to-day processing of mortgage loans. These responsibilities include processing borrower payments, transferring funds to trustees and investors, and answering borrower inquiries. Mortgage servicers are also responsible for handling delinquent loans when a borrower is late making payments. If a borrower does not cure the delinquency, mortgage servicers are responsible for choosing whether to pursue a foreclosure sale or to implement a loss mitigation option.

Foreclosures are detrimental to borrowers and the surrounding community. Forcing a borrower to leave her home creates a negative feedback loop, lowering property values in the surrounding area. Loss mitigation options are pursued as an alternative to avoid the harmful effects of foreclosures.

The financial crisis of 2007–2008 brought to light mortgage servicer behavior that pushed through an unnecessary number of foreclosures, even where borrowers had finalized loss mitigation negotiations with mortgage servicers. Reports attribute these foreclosures to miscommunication between servicers and borrowers and poor internal communication within servicers. The unprecedented number of foreclosures exacerbated the severity of the financial crisis.

The Consumer Financial Protection Bureau (the Bureau), created by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, has finalized new regulations aimed at stopping the servicing behavior that contributed to such unnecessary foreclosures. The new regulations are amendments to Regulation X, the implementing regulation of the Real Estate Settlement Procedures Act. The amendments, proposed under the Bureau's broad rulemaking power, require servicers to make early contact with delinquent borrowers, implement continuity-of-contact procedures, and establish loss mitigation application review procedures. This Comment explores the Bureau's enforcement powers and the legality of the amendments as permissible expressions of the Bureau's rulemaking authority. This Comment concludes that the broad deference to federal agencies under step

two of the Chevron *doctrine includes the amendments within the scope of the Bureau's rulemaking power.*

This Comment also addresses the immediate and potential effects of the amendments. The amendments' immediate effects are uniformity of industry standards and data creation. The Bureau is equipped with stronger supervisory and enforcement powers than any previous federal agency in this field. The amendments create an observable record of servicer behavior that will allow the Bureau to efficiently enforce federal consumer protection law, bringing greater accountability to the mortgage servicing industry. Despite this strong immediate effect, the amendments leave room for servicer discretion and manipulation, which would leave borrowers exposed to the prospect of unnecessary foreclosures.

INTRODUCTION

Mortgage servicers are responsible for the day-to-day processing of mortgage loans. This includes processing payments, communicating with borrowers and investors, and handling escrow accounts.[1] Additionally, when a borrower defaults on her loan, servicers are responsible for proceeding with a foreclosure sale, which can be detrimental to the borrower and the surrounding community, or avoiding foreclosure by implementing various loss mitigation options.[2] Because the residential mortgage market is the single largest market for consumer financial products and services in the United States, servicers are charged with immense responsibility.[3]

Poor lending practices during the 1990s and early 2000s led to a wave of borrower delinquencies, causing the financial crisis of 2007–2008.[4] Mortgage servicers, who faced very little government oversight and regulation, were unprepared to handle the wave of defaults. Borrowers, who in previous years might have had the opportunity to pursue a loss mitigation option, were pushed through hasty foreclosures.[5] The increase in foreclosures increased the harm to borrowers and communities, creating a negative feedback loop.[6]

As one response to the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).[7] Title X of the Dodd-Frank Act created a new agency, the Consumer Financial

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1 *See* FED. HOUS. FIN. AGENCY, ALTERNATIVE MORTGAGE SERVICING COMPENSATION DISCUSSION PAPER 3 (2011), *available at* http://www.fhfa.gov/webfiles/22663/ServicingCompDiscussionPaperFinal092711.pdf.

2 *See id.* at 4.

3 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,699 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024). The residential mortgage market totals $10.3 trillion in outstanding loans. *Id.*

4 *See* CATE REAVIS, MIT SLOAN MANAGEMENT, THE GLOBAL FINANCIAL CRISIS OF 2008: THE ROLE OF GREED, FEAR, AND OLIGARCHS 3–5 (2009), *available at* https://mitsloan.mit.edu/MSTIR/world-economy/Crisis-2008-2009/Documents/09-093%20The%20Financial%20Crisis%20of%202008.Rev.pdf.

5 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,251 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024).

6 *See* Patricia A. McCoy, *Barriers to Foreclosure Prevention During the Financial Crisis*, 55 ARIZ. L. REV. (forthcoming 2013) (manuscript at 6–7), *available at* http://ssrn.com/abstract=2254662.

7 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C.).

Protection Bureau (the Bureau), charged exclusively with regulating the services and products in the consumer financial market.[8] The Bureau's goals are to protect borrowers by creating transparency and accountability.[9] Congress granted the Bureau broad rulemaking and enforcement powers to accomplish these goals.[10]

The Bureau used its rulemaking powers to promulgate a new rule with stricter requirements for mortgage servicers. The new rule amends nine areas of Regulation X, the implementing regulation of the Real Estate Settlement Procedures Act (RESPA).[11] Four of the amendments are promulgated under the Bureau's broad rulemaking power.[12] The first amendment requires servicers to implement general recordkeeping procedures.[13] The second requires early contact with delinquent borrowers.[14] The third requires servicers to maintain a point of contact with borrowers,[15] and the fourth requires servicers to implement procedures for the review of loss mitigation applications.[16] These regulations are generally aimed at monitoring servicer behavior and preventing borrowers from undergoing unnecessary foreclosures.[17]

The regulations trigger two questions that prompt further inquiry. The answers to these questions are addressed in this Comment. The first question is whether the Bureau has properly interpreted its grant of broad rulemaking power from Congress, which gave the Bureau the authority to issue any rules necessary to achieve the Dodd-Frank Act's consumer protection goals. An

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8 *See* DAVID H. CARPENTER, CONG. RESEARCH SERV., THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 9 (2012), *available at* http://www.fas.org/sgp/crs/misc/R42572.pdf.

9 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,844 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024); Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks at the Consumer Financial Protection Bureau Field Hearing on Mortgage Policy (Jan. 17, 2013), *available at* http://www.consumerfinance.gov/speeches/prepared-remarks-of-richard-cordray-at-the-mortgage-servicing-field-hearing/ (describing how the new regulations will provide borrowers with a "fairer" process).

10 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1052–1054, 1056, 12 U.S.C. §§ 5562–5564, 5566 (Supp. V 2012).

11 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,200.

12 *See id.* at 57,206.

13 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,882–83 (to be codified at 12 C.F.R. § 1024.38).

14 *Id.* at 10,883 (to be codified at 12 C.F.R. § 1024.39).

15 *Id.* at 10,883–84 (to be codified at 12 C.F.R. § 1024.40).

16 *Id.* at 10,884–85 (to be codified at 12 C.F.R. § 1024.41).

17 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1052–1056, 12 U.S.C. §§ 5562–5566.

agency's interpretation of a federal statute is evaluated under the *Chevron* doctrine.[18] This Comment advocates that under the second step of *Chevron*, the Bureau's amendments to Regulation X are proper interpretations of its rulemaking authority granted by the Dodd-Frank Act.

The second question is what the amendments achieve. The amendments' immediate effects are the creation of a uniform set of mortgage servicing standards and a large data record that is accessible to the Bureau and other federal agencies. The Bureau will be able to track servicer behavior and ensure compliance with federal laws through these data. If a servicer fails to comply with federal consumer protection laws, the Bureau can initiate a strong enforcement action.[19]

Yet despite the amendments' strong oversight effect, there are remaining regulatory gaps over mortgage servicers. Under the amendments, servicers are still able to exercise their discretion in loss mitigation decisions that will block borrower access to affordable loan modifications and keep borrowers exposed to unnecessary foreclosures.[20] This Comment contends that further regulation is required to fill in these gaps.

Although further regulation is needed, this Comment asserts that the Regulation X amendments are a move in the right direction to provide more transparency and accountability for consumers in mortgage servicing. Part I provides background on mortgage servicers' duties and the requirements to which they are subject, including pooling and servicing agreements and RESPA. It explains what loss mitigation and foreclosure are, compares the outcomes for borrowers under those options, and explores how a servicer chooses between pursuing loss mitigation and foreclosure. This background on loss mitigation is important in understanding why the Regulation X amendments are necessary and the impact that the amendments will have on borrowers applying for loss mitigation options after the amendments' implementation.

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18 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

19 *See* 12 U.S.C. §§ 5562–5566.

20 *See, e.g.*, Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884 (to be codified at 12 C.F.R. § 1024.41(a)) (declaring explicitly that mortgage servicers do not have a duty to provide borrowers with any loss mitigation option); *see also* Press Release, Nat'l Consumer Law Ctr., CFPB Urged to Strengthen Rules to Stem the Tide of Foreclosures, (Oct. 10, 2012), *available at* http://www.nclc.org/images/pdf/pr-reports/pr-cfpb-servicing-rules-tila-respa.pdf (noting that the new regulations do not put any restrictions on the net present value calculations used by servicers to evaluate loss mitigation options).

Part II explains the Bureau's enforcement, supervisory, and rulemaking powers. Understanding these powers is key to understanding how the Bureau promulgated the amendments and how it will enforce them. Part II also unpacks the Regulation X amendments that were promulgated under the Bureau's broad rulemaking power and describes the new obligations with which mortgage servicers will be obligated to comply. Because the amendments are promulgated under the broad rulemaking requirements, Part III examines whether these amendments are authorized expressions of the Bureau's rulemaking power. Part III concludes that the amendments are within the Bureau's rulemaking power and should be given deference under the *Chevron* doctrine by a reviewing court.

Satisfied that the rules are permissible expressions of the Bureau's power, Part IV explores the amendments' effects and identifies any remaining gaps requiring further regulation. Part IV asserts that the amendments' immediate effects are the creation of a unifying set of standards applicable to all mortgage servicers and a recordkeeping system that allows the Bureau to efficiently enforce federal consumer protection law. The data creation and unified set of standards should address many of the concerns over servicer behavior that contributed to the wave of foreclosures during the financial crisis, as discussed in Part I.D.

Part IV advocates for further regulation to fill various gaps in the amendments. Such regulations would include standardized net present value calculation procedures, a legal safe haven for servicers who opt to modify loans in a securitized pool, and clarification of the amendments' preemption of state law and the dual-track system. Part IV explains that these additional regulations would be additional steps to stop servicers from pushing through convenient foreclosures and avoiding providing borrowers with affordable loss mitigation options.

I. MORTGAGE SERVICERS: DECIDING TO IMPLEMENT A LOSS MITIGATION OPTION

This Part first explains a mortgage servicer's duties and responsibilities through its relationship with borrowers as compared to the servicer's relationship with trustees and investors and under RESPA. This Part then discusses the differences between loss mitigation options and foreclosure and how servicers decide whether to implement a loss mitigation option or proceed with foreclosure. This Part concludes by discussing mortgage servicers' role in the 2007–2008 financial crisis. This background is important to understand the ramifications of unnecessary foreclosures and identify the aspects of mortgage servicing that the Regulation X amendments intend to fix and the gaps that this Comment argues remain to be regulated.

A. Mortgage Servicers' Duties and Responsibilities

After mortgage loans are given to borrowers by lenders, the responsibilities for the loans are passed on to mortgage servicers. Mortgage servicing is performed by a variety of entities, including banks, thrifts, credit unions, and nonbanks.[21] Although historically loan originators serviced the loans they produced, today over half of mortgage servicers are not affiliated with the originators.[22] The borrower does not have any choice as to which mortgage servicer is charged with servicing the loan as servicers are assigned to borrowers, not selected by them.[23]

A servicer contractually acquires the rights to a pool of private-label securities[24] when it enters into a pooling and servicing agreement (PSA) with the trust that owns the residential mortgage-backed securities.[25] A servicer's duties, payment rights, and responsibilities for performance are outlined in the PSA.[26] A servicer's broad responsibility is to manage the relationships among

21 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,699.

22 *See* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 765, 767 (2011). Some scholars believe this disconnect has contributed to the lack of transparency and accountability in the mortgage market. *See id.* at 763.

23 *See* Cordray, *supra* note 9 (noting that the borrower's relationship with its servicer is not voluntary).

24 "Private-label securities" are pools of loans backed by mortgages that are securitized by a private institution, such as a brokerage firm or a bank. *Mortgage Backed Securities*, SEC, http://www.sec.gov/answers/mortgagesecurities.htm (last modified July 23, 2010). Unlike some government-sponsored enterprises, such as the Government National Mortgage Association (Ginnie Mae), private-label loans are not backed by the full faith and credit of the U.S. government, meaning there is no guarantee that investors will receive principal and interest payments on outstanding securities in a timely manner. *Id.*; *see Frequently Asked Questions (FAQs)*, GINNIE MAE, http://www.ginniemae.gov/Pages/faq.aspx?cat=Consumer%20Education&subcat=All%20Subcategories&search= (last modified May 24, 2013, 8:57 AM).

25 *See* FED. HOUS. FIN. AGENCY, *supra* note 1, at 2; DIANE E. THOMPSON, NAT'L CONSUMER LAW CTR., WHY SERVICERS FORECLOSE WHEN THEY SHOULD MODIFY AND OTHER PUZZLES OF SERVICER BEHAVIOR: SERVICER COMPENSATION AND ITS CONSEQUENCES 3–4 (2009). When residential mortgages are securitized, thousands of loans are held in common ownership and ownership is centrally held by a trust. *Id.* at 3. Bonds are then issued from the trust and the bonds give investors the right to different categories of payment. *Id.* These different payment rights are known as "tranches." *Id.* The trustee manages the securitized loan pool on behalf of the investors. *Id.* at 4. Thus, the investors and the trustee have different relationships with the mortgage servicer. *Id.*

26 *See* Thompson, *supra* note 22, at 783.

the borrower, the servicer, the guarantor, the investors, and the trustee of a loan.[27] Servicers are contractually obligated to maximize the benefit for investors in a trust.[28] The trustee has the right and duty to terminate a servicer's contract if the servicer fails to act in the best interest of the trust.[29] Servicers, under standard PSAs, do not have a similar contractual duty to act in the interest of the borrower.

Mortgage servicers are charged with the day-to-day processing and monitoring of mortgage loans.[30] They process monthly payments, maintain records, manage escrow accounts, and communicate with borrowers by answering borrower inquiries, distributing tax information, and responding to payoff requests.[31] Servicers are also responsible for reporting information and distributing payments to investors, guarantors, and trustees.[32] Servicers may also be responsible for payments to third parties such as tax and insurance payments from escrow accounts and to insurance companies for force-placed insurance.[33]

Servicers remain responsible for a loan once the borrower has become delinquent in payments or otherwise defaults under the mortgage documents. When a borrower fails to make payments, the servicer is obligated under the PSA to advance principal, interest, or both to the investor plus other advances such as taxes and insurance.[34] The servicer is also obligated under the PSA to initiate contact with borrower, identify possible solutions based on a borrower's situation, and refer the loan to foreclosure if a solution cannot be found.[35] If the property is foreclosed on, then the servicer is responsible for conducting the foreclosure process.[36]

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27 *See* FED. HOUS. FIN. AGENCY, *supra* note 1, at 2.

28 *See* McCoy, *supra* note 6 (manuscript at 37).

29 *See* Thompson, *supra* note 22, at 765–66 (citing INDYMAC MBS INC., PROSPECTUS SUPPLEMENT S-12 80–81(2007)).

30 *See id.*

31 *See* FED. HOUS. FIN. AGENCY, *supra* note 1, at 3.

32 *See id.*

33 *See id.*; *Making Payments to Your Mortgage Servicer*, FED. TRADE COMMISSION (June 2010), http://www.consumer.ftc.gov/articles/0190-making-payments-your-mortgage-servicer.

34 FED. HOUS. FIN. AGENCY, *supra* note 1, at 3–4.

35 *See id.* at 4.

36 *See id.*

Despite the numerous obligations for servicers in a PSA, the documents for private-label securities typically give limited guidance to servicers.[37] Such lack of guidance historically has not been problematic because servicing requirements are generally routine.[38] During good economic conditions, mortgage servicers have been seen as "little more than . . . processing centers."[39] However, when there are high default rates on loans, such as during the financial crisis that began in late 2007,[40] mortgage servicers are responsible for making significant decisions, such as whether to foreclose on a large number of homes or pursue loss mitigation options.[41] Other than the broad obligation to maximize the economic interest of investors, PSAs give servicers broad discretion in deciding between foreclosure and loss mitigation solutions.[42]

Beyond the duties outlined in the PSA, mortgage servicers are responsible for duties described in RESPA. RESPA was enacted to "regulate[] settlement services provided in connection with residential real estate transactions and requires certain disclosures in mortgage transactions."[43] Required disclosures include the following: (1) whether the lender intends to service the mortgage loan, (2) transfer of the servicing rights, and (3) escrow account management details.[44] RESPA also requires servicers to respond to qualified written requests, such as information requests, but has limited this responsibility to requests regarding the "'servicing' of the borrower's mortgage loan."[45] The duties in RESPA, unamended by the Dodd-Frank Act, have provided limited protection for borrowers.

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[37] *See* Larry Cordell et al., *The Incentives of Mortgage Servicing: Myths and Realities* 13, 17, 21 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2008-46, 2008) (discussing the limited guidance to servicers regarding loss mitigation and foreclosure decisions).

[38] Examples of routine servicing requirements include applying payments to a borrower's account and passing payments on to trusts or investors. Thompson, *supra* note 22, at 765.

[39] *Id.* at 767.

[40] *See infra* Part I.C.

[41] *See* Thompson, *supra* note 22, at 765.

[42] *See id.* at 770; Cordell et al., *supra* note 37, at 17–18.

[43] Leonard J. Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-first Century*, 97 CORNELL L. REV. 1141, 1148 (2012) (citing 12 U.S.C. §§ 1831b, 2601–2610, 2614–2617 (2006)).

[44] 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,204 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024) (citing 12 U.S.C. § 2605(a)–(e)); *Your Rights and the Responsibilities of the Mortgage Servicer*, U.S. DEPARTMENT HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/ramh/res/rightsmtgesrvcr (last visited July 30, 2013) [hereinafter HUD].

[45] 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,204 (citing 12 U.S.C. §§ 2605(e), 2609); *see also* HUD, *supra* note 44.

B. Comparing Loss Mitigation Options and Foreclosure[46]

If a borrower defaults on her mortgage payments, servicers are obligated under PSAs to maximize recovery of the remaining amount due on behalf of the investors. There are two ways that a servicer can maximize such recovery of the amount owed by the borrower: proceed with foreclosure or develop a loss mitigation strategy.[47]

A foreclosure allows investors to recover their investments by cashing in on the value of the underlying property. Although recovery through a foreclosure may be beneficial for investors, foreclosures are harmful for borrowers. A foreclosure forces a borrower out of her home, oftentimes without allowing the borrower to recover any equity she has built up, and may expose the borrower to a deficiency action. On average, homes sell at foreclosure sales at a 27% discount to the fair market price.[48] Foreclosures lower a borrower's credit score and accumulate enormous legal and servicing fees, making future financing very difficult to find.[49] One study found that the administrative costs of a foreclosure, including legal fees and property protection fees, are estimated at $7,200 per property.[50] As many as ten million borrowers are currently at risk of foreclosure nationwide.[51]

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[46] Different industries have various views on the relationship between foreclosure and loss mitigation. From an investor perspective, foreclosure may be seen as a subset of loss mitigation because the foreclosure sale allows the investor to mitigate the loss on his investment. From a regulatory perspective, loss mitigation and foreclosure may be viewed as alternative approaches to a default, in which case loss mitigation is understood as avoiding foreclosure. The view that loss mitigation and foreclosure are two separate categories is the view that the Bureau takes in the Regulation X amendments and is the view that this Comment endorses. *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,888 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.31).

[47] PSAs restrict the circumstances under which loans that remain in the securitized pool can be modified in order to maintain the trust's status as a passively managed entity and receive favorable tax treatment. PSAs generally permit modification of a loan where the loan is in default or where default is reasonably foreseeable. THOMPSON, *supra* note 25, at 5–6. A servicer can modify as many loans as it would like so long as the servicer is "prepared to purchase the modified loans out of the loan pool." *Id* at 6.

[48] *See* McCoy, *supra* note 6 (manuscript at 5).

[49] *See id.*; Julia Gordon, Dir. of Hous., Fin. & Policy, Ctr. for Am. Progress, Remarks at the CFPB Field Hearing on Mortgage Policy (Jan. 17, 2013), *available at* http://www.consumerfinance.gov/blog/live-from-atlanta-ga/.

[50] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,858 (citing FAMILY HOUS. FUND, COST EFFECTIVENESS OF MORTGAGE FORECLOSURE PREVENTION: SUMMARY OF FINDINGS (1998), *available at* http://www.fhfund.org/_dnld/reports/MFP_1995.pdf).

[51] *See* Cordray, *supra* note 9.

Beyond the negative impact wrought on individual borrowers, foreclosures produce a negative feedback loop within communities.[52] Foreclosures cause surrounding housing prices to drop by flooding the market with available properties and leaving houses as vacant lots.[53] The depression of home prices harms a neighborhood or county by reducing property tax revenues and increasing the number of vacant homes available to squatters and vandals.[54] Some scholars have even gone so far as to blame foreclosures for the rise of the West Nile Virus since unoccupied foreclosed homes result in stagnant waters such as in swimming pools.[55]

Loss mitigation helps borrowers avoid foreclosures.[56] Although loss mitigation programs and policies are a long-standing practice for commercial real estate loans, servicers have been hesitant to adopt a strong loss mitigation practice in the residential context.[57] Scholars argue that increasing the use of loss mitigation options for residential mortgages is better for investors and borrowers.[58] First, investors can generally expect to receive a greater return from borrower performance of a loss mitigation option than can be recovered at a foreclosure sale.[59] Second, loss mitigation can prevent the negative externalities that arise from foreclosure when borrowers are able to stay in their homes.[60]

There are two primary types of loss mitigation options. The first are "workouts" and are aimed at helping borrowers stay in their homes and allow servicers to have an ongoing relationship with borrowers.[61] Workout options include (1) forbearance plans (the lender temporarily lowers the borrower's monthly payments to give her the opportunity to catch up on payments

52 *See* McCoy, *supra* note 6 (manuscript at 6–7).

53 *See id.*; *see generally* Stephan Whitaker & Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent and Foreclosed Property on Sales Prices of Neighboring Homes* (Fed. Reserve Bank of Cleveland, Working Paper No. 11-23R, 2012) (finding a strong connection between vacant and foreclosed homes on the value of surrounding homes).

54 *See* McCoy, *supra* note 6 (manuscript at 7).

55 *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 6 (2011).

56 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,218 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024).

57 *See* Thompson, *supra* note 22, at 759.

58 *See, e.g.*, McCoy, *supra* note 6 (manuscript at 5–6) (noting that the revenue effect of payments on performing loans plus high loss rates on distressed loans leaves "room for investors and banks to cut their losses by agreeing to workouts of troubled loans").

59 *See id.* (manuscript at 4–5).

60 *See id.* (manuscript at 4, 6).

61 *See* Cordell et al., *supra* note 37, at 7.

although the borrower is still liable for the entire debt),[62] (2) loan modifications (changes to the loan terms such as an extended term, reduced interest rate, lowered principal, or a combination),[63] and (3) capitalization (adds the borrower's missed back payments to the principal amount).[64]

The second type of loss mitigation option is called "liquidation."[65] These options result in borrowers losing their homes.[66] Liquidation options include (1) short sales (the house is sold for less than the full amount of unpaid principal) and (2) deeds in lieu of foreclosure (the property title is voluntarily transferred from the homeowner to the lender).[67]

Loss mitigation options and foreclosures are not necessarily exclusive. In the dual-track system, a servicer may proceed with the foreclosure process while concurrently negotiating or implementing loss mitigation options.[68] The dual-track system is mandated by the rating criteria for credit rating agencies[69] and the contractual requirements of most PSAs.[70] A servicer who does not participate in the dual-track system risks breaching obligations in the PSA and receiving a lower credit rating.[71] The dual-track requirement was originally instituted to minimize delay during the foreclosure process.[72] Unfortunately, the dual-track system often leads to needless foreclosures since loss mitigation

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62 *See* McCoy, *supra* note 6 (manuscript at 14); Cordell et al., *supra* note 37, at 7.

63 *See* Cordell et al., *supra* note 37, at 7.

64 *See* McCoy, *supra* note 6 (manuscript at 14).

65 *See id.*

66 *See* Cordell et al., *supra* note 37, at 7.

67 *Id.*

68 *See* Thompson, *supra* note 22, at 794–95.

69 *See id.* at 794, 799–800. Credit rating agencies use "not delaying foreclosure" as criteria for their residential mortgage servicer ratings. McCoy, *supra* note 6 (manuscript at 45). The ratings given to mortgage servicers by credit rating agencies factor into how much a servicer "must bid for servicing rights" and influence a servicer's "ability to acquire new mortgage servicing rights and the servicer['s] ongoing cost of credit." THOMPSON, *supra* note 25, at 14. *See generally What Credit Ratings Are & Are Not*, STANDARD & POOR'S, http://www.standardandpoors.com/aboutcreditratings/RatingsManual_PrintGuide.html (last visited Aug. 15, 2013) (explaining how Standard & Poor's, a leading rating agency, uses credit ratings).

70 Trusts generally require that foreclosure options be pursued even if loss mitigation efforts have been initiated. *See* Cordell et al., *supra* note 37, at 13.

71 *See* Thompson, *supra* note 22, at 794.

72 *See id.* at 795–96 (citing *Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 8 (2010) (statement of Donald Bisenius). The concern for delay during the foreclosure process as justification for the dual-track system is more relevant in fast, nonjudicial foreclosure states, such as Georgia and Texas, where a foreclosure can be finalized in less than six weeks, than in judicial foreclosure states with longer foreclosure times, such as Florida or Ohio where foreclosures take an average of 135 and 217 days respectively. *See Foreclosure Laws and Procedures by State*, REALTYTRAC, http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp (last visited Aug. 15, 2013).

and foreclosure are handled by two separate departments within mortgage servicers and communication between the two departments is imperfect.[73]

C. Choosing Between Loss Mitigation Options and Foreclosure

Servicers evaluate foreclosure and loss mitigation options by comparing the net present value (NPV) calculations for each available option.[74] NPV represents the present value of the money that the servicer would expect to receive from implementing a course of action.[75] Servicers consider three factors when calculating NPV: (1) the risk that a modified loan will redefault, (2) the possibility that a delinquent borrower will self-cure and resume payments on her own without servicer action, and (3) the discount rate to apply to the reduced stream of revenue from a loan modification.[76] Servicers are virtually unrestrained by regulations or provisions in the PSAs when determining the values or formulae for NPV calculations.[77] Servicers determine the likely foreclosure price, the discount rate, and "the likelihood that the borrower will redefault."[78]

The lack of guidance means servicers have a large amount of discretion in determining which values go into an NPV calculation. A servicer can manipulate an NPV calculation to justify a decision to pursue a loss mitigation option or foreclosure.[79] Servicers are influenced by several factors including incurring additional expenditures and the probability of recouping costs, servicer compensation, and the existence of junior liens on the property.[80]

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73 *See* Thompson, *supra* note 22, at 794, 830.

74 *See* McCoy, *supra* note 6 (manuscript at 37).

75 *See* Nat'l Consumer Law Ctr., *Home Affordable Mortgage Program*, 27 NCLC REP. BANKR. & FORECLOSURES EDITION 19, 19 (2009).

76 *See* McCoy, *supra* note 6 (manuscript at 38).

77 *See id.* (manuscript at 37–38) ("PSAs give servicers of private-label RMBS a high degree of latitude in how to calculate [NPV]."); *see also* Cordell et al., *supra* note 37, at 22 (observing restrictions in PSAs on what types of loss mitigation options could be implemented but only restricting *NPV calculations* to the extent that they must maximize the investors' profits). *But see* Cordell et al., *supra* note 37, at 18 (noting that some government-sponsored enterprises require servicers to use standardized software when calculating NPV).

78 McCoy, *supra* note 6 (manuscript at 38). "Investors rarely monitor these choices or question them." *Id.*

79 *See id.*

80 *See id.* (manuscript at 41). For further reading on the incentives of mortgage servicers, see *id.* (manuscript *passim*), which evaluates various factors on mortgage servicers' decisions to implement loan modifications for default loans. *See also, e.g.*, Thompson, *supra* note 22 (examining servicer incentives that make foreclosure more profitable than loan modifications); Cordell et al., *supra* note 37 (describing financial factors that influence mortgage servicer decisions).

These factors impact servicer decisions in favor of foreclosures and unsustainable loss mitigation options, often against the best interest of investors and borrowers.[81] Servicers can spend less money and recoup more costs by foreclosing rather than modifying.[82] Despite the large losses that servicers, investors, and borrowers may face in foreclosure, foreclosure is frequently less expensive than loss mitigation for servicers because the process is systematic and does not vary based on individual borrowers' circumstances.[83]

When servicers find it in their best interest to proceed with loss mitigation, servicers are incentivized to pursue options that forbear principal, capitalize arrears, and add default fees.[84] These options are most attractive to servicers as they "pump up the unpaid balance of the loan pool" and have the lowest effect on the servicer's greatest source of income: the fixed monthly fee on the unpaid principal balance.[85] These options are ultimately ineffective because without a counterbalancing payment reduction, such as reduced interest or an extension of the term, the increased principal balance increases a borrower's mortgage payments.[86] Implementing improper loss mitigation options increases the likelihood that a borrower will redefault on her mortgage and lose her home.[87]

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81 *See* McCoy, *supra* note 6 (manuscript at 35) ("There is good reason to believe that servicers sometimes refuse to make loan modifications even when those modifications would minimize losses to investors relative to foreclosure."); Cordell et al., *supra* note 37, at 15. When a borrower becomes delinquent, the cheapest option for servicers is to do nothing and allow borrowers the opportunity to self-cure. *See* Thompson, *supra* note 22, at 824. Borrowers can borrow money from a friend, win the lottery, or fix a difficult situation (such as getting a job when the cause for default was unemployment). *Id.* Historically, these odds are approximately one in four. *Id.* Many servicers prefer to take those odds than incur the cost of loss mitigation or foreclosure. *Id.*

82 *See* Thompson, *supra* note 22, at 771–72.

83 The foreclosure process is prescribed by statute and does not change for individual borrowers. *See* Cordell et al., *supra* note 37, at 15–16. Servicers do not need to hire specially trained employees to process foreclosures. On the other hand, employees in loss mitigation departments require special training and significant time to determine the appropriate loss mitigation option for each borrower. *See id.* at 15–16, 23; *see also* Thompson, *supra* note 22, at 821–23 ("Modifications are costly in terms of staff time and skill to implement."). For example, a servicer must calculate NPV estimates, verify data, and coordinate its actions with the servicers for junior liens on the property. Cordell et al., *supra* note 37, at 15.

84 *See* McCoy, *supra* note 6 (manuscript at 43); Thompson, *supra* note 22, at 772, 807–09, 818 ("Servicers can . . . make more money by making short-term unsustainable payment agreements than they can by making long-term, sustainable modifications.").

85 McCoy, *supra* note 6 (manuscript at 42).

86 *See id.* (manuscript at 32).

87 *See* Cordell et al., *supra* note 37, at 23–24 ("A high recidivism rate directly impinges on the profitability of a potential loan modification . . . [because it] increases the odds that the servicer will incur

D. The Financial Crisis of 2007–2008

This section discusses the economic situation that was the impetus for the Regulation X amendments. The large number of foreclosures during the financial crisis of 2007–2008 set the stage for the Dodd-Frank Act and the subsequent regulation of the mortgage servicing industry.[88] The crisis was caused by the collapse of the U.S. housing market that accompanied a larger financial crisis on Wall Street and the worst economic panic since the Great Depression.[89]

A housing bubble was created in the 1990s and early 2000s through the growth of private-label securitization caused by the easy availability of financing and banks' willingness to issue a range of untraditional mortgage products.[90] Lenders were able to make increasingly risky mortgages through excess liquidity, rising home prices, and an ineffectively regulated primary mortgage market.[91] Lenders were encouraged to make risky loans because they were pooling and selling the loans as residential mortgage-backed securities on the secondary mortgage market and were able to hedge their investments with credit default swaps.[92] Risky mortgages were often given to people at the lowest end of lending standards because they did not have the financial security to be approved for a traditional mortgage.[93] Investors in securitizations believed they were guaranteed recovery assuming that borrowers would either default, in which case the lender could foreclose on the property, or that housing prices would increase so borrowers would refinance, giving lenders the opportunity to charge additional fees.[94]

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labor costs of modification again . . . ."); *see also* Tad Friend, *Home Economics*, THE NEW YORKER, Feb. 4, 2013, at 26, 27.

88 *See* CARPENTER, *supra* note 8, at 1.

89 *See* REAVIS, *supra* note 4, at 3; Kennedy et al., *supra* note 43, at 1142; Bill Thomas et al., Opinion, *What Caused the Financial Crisis?* WALL ST. J. (Jan. 26, 2011), http://online.wsj.com/article/SB10001424052748704698004576104500524998280.html.

90 *See* Thomas et al., *supra* note 89.

91 MICHAEL LEWIS, THE BIG SHORT 47 (2010); Thomas et al., *supra* note 89.

92 *See* LEWIS, supra note 91, at 90–91.

93 *See id.* at 96–97. Some lenders even waived the requirement for borrowers to show proof of income before approving a mortgage. *Id.* The Bureau has addressed the problem of lenders not checking borrower income in its Ability-to-Repay rule, which institutes specific underwriting requirements. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 35,430, 35,430, 35,348 (June 12, 2013) (to be codified at 12 C.F.R. pt. 1026).

94 LEWIS, *supra* note 91, at 169.

In 2007 the housing bubble burst when borrowers were unable to pay their mortgages.[95] The wave of defaults was met with a wave of hasty foreclosures because mortgage servicers were not prepared to handle the vast number of simultaneous defaults. Mortgage loan delinquency rates almost doubled between 2007 and 2009 for first-lien mortgage loans from 5.4% to 9.4%.[96] The increased number of foreclosures depressed housing prices.[97] By 2012 housing prices had fallen 33% from 2006, eliminating $7 trillion in homeowner equity and preventing homeowners from being able to refinance or sell their homes to pay off their mortgages.[98]

The financial crisis showed that the mortgage servicing industry lacked the infrastructure to handle high volumes of delinquent mortgages. Mortgage servicers pushed to foreclose on properties before evaluating borrowers for loss mitigation options.[99] Borrowers reported difficulties contacting servicers, receiving incomplete information, and having their homes foreclosed on even after they had entered into or agreed upon loss mitigation options.[100] In January 2013, 1.47 million foreclosed homes were listed for sale and an additional 2.3 million foreclosed homes sat unlisted.[101] In contrast, about 620,000 homes were foreclosed on in 2004.[102] When mortgage servicers did implement loss mitigation options in 2007 and 2008, the majority of options increased borrowers' monthly payments rather than reducing them.[103] This was a "recipe for failure" for "cash-strapped borrowers."[104] The amendments to Regulation X are intended to standardize servicer communication and loss mitigation application procedures to prevent such a large number of foreclosures and the loss of homeowner equity in the future.[105]

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95 REAVIS, *supra* note 4, at 4.

96 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,700 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

97 REAVIS, *supra* note 4, at 4.

98 McCoy, *supra* note 6 (manuscript at 6–7).

99 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,251 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024).

100 *See id.* at 57,200, 57,203–04, 57,261.

101 McCoy, *supra* note 6 (manuscript at 1).

102 Cordell et al., *supra* note 37, at 7 tbl.1.

103 McCoy, *supra* note 6 (manuscript at 24). For example, one study showed that over 84% of loan modifications involved capitalized arrears even though this increased the risk of redefault for underwater borrowers. *Id.* (manuscript at 34, 62).

104 *Id.* (manuscript at 23–25).

105 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,696 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

II. THE REGULATION X AMENDMENTS

This Part examines the Bureau's enforcement and supervisory powers compared to the power held by regulators of federal consumer protection laws before the Dodd-Frank Act and surveys the requirements for mortgage services from the Regulation X amendments. Understanding the Bureau's enforcement powers is essential to understanding how the Regulation X amendments will be implemented. For example, the strength of the Bureau's powers to implement the recordkeeping requirements discussed in section B of this Part is key to understanding the data-collection effect discussed in Part IV.

A. The Consumer Financial Protection Bureau

Congress passed the Dodd-Frank Act in 2010 as a response to the financial crisis failure in 2007–2008.[106] The Dodd-Frank Act created the Bureau, which exists as an independent agency within the Federal Reserve System.[107] Congress consolidated regulatory and rulemaking authority in the Bureau, and gave it strong enforcement powers to compel compliance with federal consumer protection law.

1. Creating the Bureau

Government regulation of mortgage servicers before the Dodd-Frank Act was almost nonexistent and the government programs were ineffective. The George W. Bush and Obama Administrations attempted to coordinate private industry efforts to modify distressed loans through voluntary incentive programs.[108] Unfortunately, the programs were unsuccessful at increasing loan modifications. The success of the regulations depended on cooperation by

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[106] Kennedy et al., *supra* note 43, at 1142.

[107] Susan Block-Lieb & Edward J. Janger, *Reforming Regulation in the Markets for Home Loans*, 38 FORDHAM URB. L.J. 681, 701 (2011) (citing Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491 (Supp. V 2012))). Despite being part of the Federal Reserve System, the Bureau has considerable independence, and the Federal Reserve Board does not have the authority to "stop, delay, or disapprove of a Bureau regulation." CARPENTER, *supra* note 8, at 11.

[108] McCoy, *supra* note 6 (manuscript at 9–12). The most significant program was the Home Affordable Modification Program (HAMP), implemented in 2009, which offered subsidies to servicers because it assumed that servicers only avoided performing loss mitigation options due to the impact to their income. *Id.* (manuscript at 19, 25). HAMP was not found to be conclusively successful because 42% of borrowers have failed to graduate to permanent loan modifications. *Id.* (manuscript at 34 n.105).

servicers on unattractive terms and "servicers were unwilling to swallow large, certain write-downs instead of gambling on [losses in] foreclosure."[109]

Regulation of mortgage servicers before the Dodd-Frank Act did not provide sufficient oversight of servicer behavior. As described in Part I.A, RESPA focused on mandating disclosures.[110] Additionally, rulemaking and enforcement authority over federal consumer protection law was spread between seven federal agencies: five banking regulators, the Federal Trade Commission, and the Department of Housing and Urban Development.[111] The Federal Reserve Board held rulemaking powers, and enforcement authority was diffused among the bank regulators, FTC, and HUD.[112] Although the banking regulators had strong supervisory powers over depository institutions, such as banks, nondepository institutions and mortgage servicers were subject to limited, if any, supervision.[113]

Congress created the Bureau to be the primary regulator of entities providing consumer financial products and services.[114] The Dodd-Frank Act consolidates power in the Bureau from the seven agencies previously charged with supervising federal consumer protection law.[115] The consolidation is a grant of new authority, not a transfer of power from the existing agencies.[116] The federal agencies retain regulatory power over federal consumer protection law and are expected to act in conjunction with the Bureau on enforcement actions.[117] An agency may recommend and, if the Bureau fails to take action,

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109 *Id.* (manuscript at 11); *see also* Thompson, *supra* note 22, at 829. ("As long as servicers can choose not to perform modification, they will, by and large, choose the path of least resistance—foreclosures and temporary modifications that strip wealth from both investors and homeowners.").

110 *See supra* Part I.A; *see also* Kennedy et al., *supra* note 43, at 1148.

111 CARPENTER, *supra* note 8, at 2. The five banking regulators included the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of Thrift Supervision. *Id.*

112 *Id.* at 4.

113 *See id.* at 2–4. For example, the FTC had limited supervisory authority and could not institute reporting requirements on nondepository institutions. *Id.* at 3. The FTC could only regularly examine these institutions with "*ex post* enforcement," leaving them fairly unchecked. *Id.*

114 *See id.* at 9; John D. Wright, *Dodd-Frank's "Abusive" Standard: A Call for Certainty*, 8 BERKELEY BUS. L.J., no. 2, 2011, at 164, 165. Entities providing consumer financial product services include nonbank entities such as "mortgage originators, brokers, and servicers; private student lenders; [and] payday lenders." Kennedy et al., *supra* note 43, at 1146–47.

115 *See* CARPENTER, *supra* note 8, at 2, 4, 9; Michael T. Escue, *First CFPB Public Enforcement Action Offers Insight into Agency Expectations*, 248 N.Y. L.J., Aug. 29, 2012, at 3.

116 *See* Escue, *supra* note 115.

117 *See, e.g.*, *id.* (describing CFPB's enforcement action against Capital One Bank for $160 million "taken in coordination with the Office of the Comptroller of the Currency."); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1015, 12 U.S.C. § 5495 (Supp. V 2012).

initiate its own enforcement action for violations of federal consumer protection law.[118] The consolidation of authority in the Bureau ensures that a single federal agency has adequate authority to efficiently and consistently enforce federal regulation over all industry entities.

2. *The Bureau's Powers*

The Bureau has primary rulemaking authority over many federal consumer protection laws, including RESPA.[119] The Dodd-Frank Act outlines specific rules the Bureau should enact and endows the Bureau with broad rulemaking power to "prescribe rules . . . as may be necessary . . . to enable to Bureau to administer and carry out the purposes and objectives of the Federal consumer laws."[120] Beyond the broad grant of rulemaking power, the Dodd-Frank Act is relatively silent about the "substantive breadth of the Bureau's rulemaking authority."[121]

The Bureau has stronger enforcement powers than any single federal agency regulating consumer financial services before the Dodd-Frank Act. Important for the Regulation X amendments is the Bureau's ability to implement recordkeeping requirements on supervised entities.[122] The Bureau's enforcement powers include the ability to demand the production of any documentary material or tangible things, require sworn testimony, file written reports, conduct hearings and adjudication proceedings, litigate civil actions, issue temporary cease and desist orders, and refer criminal matters to the Department of Justice.[123]

Additionally, the Bureau has the power to implement significant relief measures for violations of federal consumer protection laws. Relief may

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118 CONSUMER FED'N OF AM., ACCOUNTABILITY OF THE CONSUMER FINANCIAL PROTECTION BUREAU 3 (2011), *available at* http://www.consumerfed.org/pdfs/CFPB-Accountability-fact-sheet-6-11.pdf.

119 *See* 12 U.S.C. §§ 5512(b)(4)(a), 5581(b)(7); CARPENTER, *supra* note 8, at 1. Although the Bureau has acquired primary rulemaking authority over most federal consumer protection laws, it does not have authority over all federal consumer laws. For example, HUD is the primary rulemaking authority under the Fair Housing Act. 42 U.S.C. § 3608 (2006).

120 12 U.S.C. § 5512(b)(1).

121 Block-Lieb & Janger, *supra* note 107, at 705. Some practitioners and academics have expressed concern for the seeming lack of oversight of the Bureau's regulations. *See* Wright, *supra* note 114, at 165.

122 *See* 12 U.S.C. § 5514(b)(7)(B).

123 *See id.* §§ 5562–5564, 5566; *see also* Laureen E. Galeoto et al., *The Consumer Financial Protection Bureau: The New Sheriff in Town*, 129 BANKING L.J. 702, 706 (2012); KING & SPALDING, CLIENT ALERT: CFPB PROPOSES CHANGES TO REGULATIONS Z AND X (2012), *available at* http://www.kslaw.com/imageserver/KSPublic/library/publication/ca081312b.pdf.

include rescission of contracts, refund of money, return of property, restitution, public notice of the violation, and limits on what functions an entity can perform.[124] The monetary penalties are steep and range from $5,000 to $1 million per day for every day an entity violates a federal consumer protection law.[125]

B. Amendments to Regulation X

The Bureau proposed nine amendments to Regulation X on August 9, 2012, under notice and comment rulemaking.[126] The rule was finalized on January 17, 2013, with an effective date of January 10, 2014.[127] The amendments change nine areas of mortgage servicing with the intent of creating greater accountability and transparency for consumers.[128] Four of the amendments are promulgated under the Bureau's broad rulemaking power.[129] These four amendments are the most important for purposes of this Comment's analysis.

Alongside creating transparency and accountability, the amendments to Regulation X aim to consolidate existing federal requirements for mortgage

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124 *See* 12 U.S.C. § 5565.

125 *See id.* § 5565(c)(2); *see also* Galeoto et al., *supra* note 123, at 706.

126 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,200–02 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024); Diana Olick, *Big Banks Pushed to Outsource Mortgages*, CNBC (Aug. 13, 2012, 2:32 PM), http://www.cnbc.com/id/48648395. The amendments apply to "[f]ederal related mortgage loans," which include any loan secured by a first or subordinate lien on residential property and installment land contracts, with a few exceptions. *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,873–74 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.2(b)). The regulation generally excludes open lines of credit, business-purpose loans, and temporary loans, such as construction loans. *See id.* at 10,698. "Open-end lines of credit ([HELOCs]) are generally exempt from" Regulation X's requirements, though they are regulated under Regulation Z, the enacting regulation for the Truth in Lending Act. *Id.* at 10,698, 10,721. The Bureau exempted HELOCs from Regulation X because HELOCs are more similar to open-end consumer products, such as credit cards, and have different servicing risks from closed-end mortgage loans. *Id.* at 10,721.

127 *Id.* at 10,696, 10,708.

128 *See id.* at 10,696; CONSUMER FIN. PROT. BUREAU, PUTTING THE 'SERVICE' BACK IN MORTGAGE SERVICING: NO SURPRISES, NO RUNAROUNDS (2012), *available at* http://files.consumerfinance.gov/f/201208_cfpb_mortgage_servicing_fact_sheet.pdf; *see also* Cordray, *supra* note 9 (noting that the rules are intended to provide a fairer process for borrowers at risk of losing their homes).

129 *See* 12 U.S.C. §§ 5512(b)(1); 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,206. The four amendments promulgated under the broad rulemaking power are (1) general servicing policies, procedures, and requirements; (2) early intervention with delinquent borrowers; (3) continuity of contact with delinquent borrowers; and (4) loss mitigation procedures. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,696.

servicers.[130] Under the preexisting terms of RESPA, servicers must meet specific requirements for various types of loans and the corresponding entities that sponsor those loans.[131] These include servicing guidelines for government-sponsored enterprises, government insured program guidelines, contractual agreements with investors and trustees for private-label loans, and bank- or institution-specific policies.[132] Along with consolidating these existing requirements, the amendments also incorporate some of the mortgage servicing requirements that were part of the National Mortgage Settlement.[133] These requirements will persist alongside Regulation X and the amendments are not intended to preempt these restraints.[134] The Bureau's incorporation and consideration of existing restrictions into Regulation X's framework is intended to create a more efficient set of requirements applicable to all mortgage servicers.

The four amendments promulgated under the Bureau's broad rulemaking power have three aims: (1) requiring servicers to keep records of borrower information and communication, (2) facilitating and recording communication between the borrower and the servicer, and (3) establishing uniform loss mitigation application review procedures.[135] The Bureau anticipates that the transparency and accountability from these requirements will help borrowers avoid unnecessary foreclosures.[136] This Comment argues in Part IV that the immediate effects of these amendments are the creation of uniform industry standards and collection of data on servicer behavior. This Comment also

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130 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,209.

131 *Id.* at 57,204–05.

132 *Id.*

133 *Id.* at 57,205. *See generally* PHILIP A. LEHMAN, NAT'L MORTG. SETTLEMENT, EXECUTIVE SUMMARY OF MULTISTATE/FEDERAL SETTLEMENT OF FORECLOSURE MISCONDUCT CLAIMS (2012), *available at* https://d9klfgibkcquc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf (explaining the background, terms, and resulting payments of the National Mortgage Settlement). The Settlement was a joint action by state attorneys general and various federal agencies, including HUD, against the five leading bank mortgage servicers for their loan-servicing practices and foreclosure processes, especially robo-signing affidavits. *Id.* at 1. The five bank mortgage servicers were Bank of America Corp., J.P. Morgan Chase & Co., Wells Fargo & Co., Citigroup Inc., and Ally Financial Inc. *See* NAT'L MORTG. SETTLEMENT, FACT SHEET: MORTGAGE SERVICING SETTLEMENT 2 (2012), *available at* https://d9klfgibkcquc.cloudfront.net/Mortgage_Servicing_Settlement_Fact_Sheet.pdf. The Settlement resulted in $25 billion in monetary sanctions and relief, as well as comprehensive changes to mortgage loan-servicing requirements. *See id.* The Settlement is not federal law and has no federal significance beyond the parallel promulgation by the Bureau.

134 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,205.

135 *See id.* at 57,205, 57,209–10.

136 *See* 5*id.* at 57,209–10, 57,274.

asserts that the amendments leave gaps—such as a flexible NPV requirement—that leave borrowers exposed to improper loss mitigation options.

1. Recordkeeping Requirements

The first amendment establishes general servicing procedures aimed at implementing recordkeeping requirements.[137] The required policies should facilitate compliance with the communication requirements and the loss mitigation procedures in the other amendments.[138] The records and procedures in this amendment are subject to supervision by the Bureau and federal regulators.[139] Under the first amendment, the servicer must keep a servicing file for each mortgage loan account while the servicer is actively servicing the loan.[140] The servicing file must contain specific documents, including a copy of the security instrument and copies of information provided for loss mitigation applications.[141] Servicers are obligated to keep this file and documentation of their actions with respect to a borrower's loan account for at least one year after the mortgage is either discharged or transferred.[142] Requiring servicers to have copies of accurate information aims to avoid some of the confusion between servicers and borrowers that contributed to the unnecessary foreclosures during the financial crisis.[143]

2. Facilitating and Recording Servicer–Borrower Communication

The Bureau requires servicers to implement early contact, single point of contact, and information access procedures under the first, second, and third amendments.[144] These requirements create a record of servicer–borrower communication. Servicer procedures implemented under this section are

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[137] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,882–83 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.38).

[138] *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,248, 57,280, 57,304.

[139] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,697–98.

[140] *Id.* at 10,883 (to be codified at 12 C.F.R. § 1024.38(c)).

[141] *See id.*

[142] *Id.* (to be codified at 12 C.F.R. § 1024.38(c)(1)).

[143] *See supra* Part I.D (discussing how servicer behavior exacerbated the wave of foreclosures resulting from the financial crisis of 2007–2008).

[144] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,882–84 (to be codified at 12 C.F.R. § 1024.38–.40).

subject to supervision by the Bureau and regulators, but borrowers do not have a private right of action for enforcement.[145]

The second amendment requires all servicers to initiate early contact with delinquent borrowers or a borrower's agent.[146] The amendment has two communication components: an oral notice of delinquency and a written notice with information.[147] When giving the oral notice,[148] the servicer must notify the borrower that the payment is late or missing and, if applicable, that loss mitigation options are available.[149] The initial conversation about a borrower's delinquency will allow a servicer to begin to identify appropriate loss mitigation options.[150] The written notice[151] must include specific information, including a statement encouraging the borrower to contact the servicer, and a statement of loss mitigation options that may be available.[152] Written notice provides the borrower with consistent information and a reference to detailed information that can be taken to a third-party advisor, such as a housing counselor.[153]

The third amendment implements staffing procedures that assign staff members to delinquent borrowers contacted via written notice under the second amendment.[154] The servicer has the discretion to assign a single person or a team of personnel to a borrower.[155] Personnel assigned to delinquent

145 *See id.* at 10,698.

146 *See id.* at 10,895 (to be codified at 12 C.F.R. § 1024.39(a) cmt. 4).

147 *See id.* at 10,883 (to be codified at 12 C.F.R. § 1024.39(a)–(b)).

148 *See id.* (to be codified at 12 C.F.R. § 1024.39(a)). Oral notice must be given over the phone or in person no later than thirty-six days after a missed payment date. *Id.* Oral servicer–borrower contact must be done over the phone or in person, but cannot be made with a phone-delivered recording. *See id.*

149 *See id.* Notification of loss mitigation options is applicable, for example, where the servicer learns of a change in the borrower's financial circumstances. *See id.* at 10,894–95 (to be codified at 12 C.F.R. § 1024.39(a) cmt. 3(i)(A)).

150 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,252 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024).

151 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,883 (to be codified at 12 C.F.R. § 1024.39(b)). The written notice must be sent to a borrower that is still delinquent no later than the forty-five days after the missed payment (ten days after the thirty-six-day oral communication period has expired). *Id.*

152 *See id.* (to be codified at 12 C.F.R. § 1024.39(b)(2)).

153 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,255.

154 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,883–84 (to be codified at 12 C.F.R. § 1024.40(a)(1)). A comment to the amendment broadens a servicer's responsibility to the "borrower" to include an agent authorized to act on the borrower's behalf, such as a housing counselor or attorney. *See id.* at 10,895–96 (to be codified at 12 C.F.R. § 1024.40(a) cmt. 1).

155 See *id.* at 10,896 (to be codified at 12 C.F.R. § 1024.40(a) cmt. 2).

borrowers are responsible for answering borrower inquiries and helping borrowers navigate loss mitigation options.[156]

Under the third amendment, the assigned personnel must be able to access a complete record of the borrower's payment history and all written information the borrower has provided to the servicer or prior servicers as part of a loss mitigation application, filed in accordance with the first amendment.[157] This access enables the personnel to perform a designated list of functions that provide borrowers with information about loss mitigation options, loss mitigation applications, and foreclosures.[158] Similarly, the first amendment requires servicers to maintain policies that provide the servicing parties with accurate information, including timely and accurate responses to borrower inquiries and proper loss mitigation application evaluation.[159] The objectives are considered achieved when a servicer retains and has easy access to "accurate and current" documents reflecting servicer action and borrower information.[160]

The Bureau anticipates that early outreach to borrowers and an assigned point of contact within the servicer will help borrowers avoid foreclosure.[161] Oral and written contact at an early stage of delinquency notifies the borrower of her options, giving her an opportunity to either self-correct a mistake, consider and apply for loss mitigation options in accordance with the fourth amendment requirements, or prepare for the foreclosure process.[162] Assigning personnel to a delinquent borrower gives the borrower a certain point for communicating with the servicer and makes someone within the servicer personally accountable to the individual. The Bureau believes that borrower delinquencies will be solved more efficiently if personnel have access to

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156 *See id.* at 10,883–84 (to be codified at 12 C.F.R. § 1024.40(a)(2)). A servicer must assign personnel to delinquent borrowers by the time provided for written notice (no later than the forty-fifth day of delinquency). *See id.* at 10,884. Servicer personnel must be available via telephone to give live responses or the servicer should have procedures that ensure a live response in a "timely manner." *Id.* The assigned personnel remain available to the borrower until the borrower has made two consecutive mortgage payments in accordance with the terms of a permanent loss mitigation agreement. *See id.*

157 *See id.* at 10,884 (to be codified at 12 C.F.R. § 1024.40(b)(2)).

158 *See id.* (to be codified at 12 C.F.R. § 1024.40(b)).

159 *See id.* at 10,882–83 (to be codified at 12 C.F.R. § 1024.38(b)(1)–(2)).

160 *See id.* at 10,882, 10,893 (to be codified at 12 C.F.R. § 1024.38(b)(1)(iv) cmt. 1). For example, the servicer's policies should show how a servicer identifies the loss mitigation options that are available to various borrowers and its threshold for borrower eligibility. *See id.* at 10,893 (to be codified at 12 C.F.R. § 1024.38(b)(2)(ii) cmt. 1).

161 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,261 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024).

162 *See id.* at 57,251.

borrower information.[163] Coupled with the recordkeeping requirements in the first amendment, the communication procedures in the second and third amendment may avoid the mishandling of borrower's loss mitigation applications caused by servicers' improper infrastructure and unaccountable personnel during the financial crisis.[164]

3. *Loss Mitigation Procedures*

The fourth amendment provides a uniform set of procedures for processing loss mitigation applications.[165] The amendment establishes a timeline intended to prevent hasty foreclosures, provide borrowers and servicers with sufficient time to apply for and review loss mitigation options, and limit the dual-track system.[166] The requirements in this amendment are intended to work in conjunction with the early borrower contact and continuity-of-contact requirements to avoid burdening servicers.[167] Individual borrowers can enforce the loss mitigation provisions in the fourth amendment through private action under RESPA. [168]

The amendment limits servicer foreclosure action. Servicers are prohibited from issuing a notice or filing required for any judicial or nonjudicial foreclosure process until the borrower has been delinquent for 120 days.[169] This 120-day "buffer" is in place for all borrowers, regardless of whether they submit a loss mitigation application.[170] Additionally, servicers cannot move for a foreclosure judgment or order of sale, or conduct a foreclosure sale if a borrower submits a complete loss mitigation application after the first foreclosure notice or filing but more than thirty-seven days before a foreclosure sale.[171] The servicer cannot continue with or complete the foreclosure process unless one of three events has occurred: (1) the servicer

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163 *See id.* at 57,261.

164 *See id.*

165 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,884–85 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.41).

166 *See id.*; 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. at 57,266–67.

167 *See id.* at 57,267.

168 *See* 12 U.S.C. § 2605(f) (2006); Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884 (to be codified at 12 C.F.R. § 1024.41(a)).

169 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884–85 (to be codified at 12 C.F.R. § 1024.41(f)(1)).

170 *See* Gordon, *supra* note 49.

171 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884–85 (to be codified at 12 C.F.R. § 1024.41(g)).

sends the borrower a notice that the borrower is ineligible for all loss mitigation options and an appeal is not available, not requested, or denied, (2) the borrower rejects the servicer's loss mitigation option, or (3) the borrower fails to perform under a loss mitigation option agreement.[172]

The amendment establishes steps for the review and evaluation of completed loss mitigation applications.[173] A servicer must evaluate a borrower for all options for which the borrower may be qualified—both workout and liquidation options.[174] However, servicers control the eligibility criteria for loss mitigation options.[175] Additionally, "[s]ervicers are free to follow 'waterfalls' established by an investor to determine eligibility for particular loss mitigation options."[176] The borrower has the right under the fourth amendment to receive written notice and participate in the appeals process for the denial of any "trial or permanent loan modification option available to the borrower."[177] The written notice must include "the specific reasons" for the servicer's determination, the borrower's right to appeal,[178] and any inputs used to make an NPV calculation to the extent such inputs were the basis for the denial.[179] The amendment neither mandates the outcome of loss mitigation evaluations

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172 *Id.* (to be codified at 12 C.F.R. § 1024.41(f)(2), (g)). In these instances, the servicer has the responsibility to inform counsel not to proceed with the foreclosure. *See id.* at 10,698.

173 *See id.* at 10,884 (to be codified at 12 C.F.R. § 1024.41(b)). The Bureau defines a "loss mitigation application" as an oral or written request for a loss mitigation option (defined as an alternative to foreclosure) accompanied by information required by a servicer. *Id.* at 10,876 (to be codified at 12 C.F.R. § 1024.31). A complete application is an application that includes "all the information the servicer regularly obtains and considers" for evaluating loss mitigation options. 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,268 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024). The Bureau makes it clear that a servicer "shall not evade the requirement[s]" of Section 1024.41 because the application is incomplete and shall use "reasonable diligence" to complete the application. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884 (to be codified at 12 C.F.R. § 1024.41(c)(2)(i)–(ii)). These procedures only apply to mortgage loans securing a borrower's principal residence. *See id.* at 10,698.

174 *See id.* at 10,884 (to be codified at 12 C.F.R. § 1024.41(c)(1)(i)). *See generally supra* Part I.B.

175 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,827.

176 *Id.* at 10,698. A "waterfall" is an evaluation rule that prioritizes loss mitigation options. *Id.* at 10,827. For example, if loss mitigation options are ranked one through six and a borrower is eligible for an option higher on the list, then he is deemed denied for the lower options. *Id.*

177 *See id.* at 10,885 (to be codified at 12 C.F.R. § 1024.41(d)(1), (h)(1)). The right to appeal the denial of a trial or permanent loan modification option is only available to borrowers whose competed loss mitigation application were received at least ninety days before a scheduled foreclosure sale. *See id.* (to be codified at 12 C.F.R. § 1024.41(h)(1)).

178 *Id.* (to be codified at 12 C.F.R. § 1024.41(d)).

179 *See id.* at 10,897 (to be codified at 12 C.F.R. § 1024.41(d)(1) cmt. 2).

nor imposes a duty on servicers to provide any borrower with loss mitigation options.[180]

III. AGENCY RULEMAKING UNDER THE *CHEVRON* DOCTRINE

The Regulation X amendments are demonstrations of the Bureau's interpretation of its authority to create and enforce rules for consumer protection under RESPA.[181] The promulgation of the amendments under the Bureau's broad rulemaking power raises the question of whether the issuance of these rules is permissible.[182] This Comment concludes that requiring recordkeeping systems, policies for contact with delinquent borrowers, and loss mitigation evaluation procedures are an authorized exercise of the Bureau's broad rulemaking power.

For an agency regulation to be valid, the regulation must be consistent with the congressional statute under which the agency was given rulemaking authority.[183] An attack on a regulation's validity can be aimed at the substance of the rule or at how the rule was promulgated procedurally. Both attacks require an analysis of the agency's interpretation of the statute it administers under the *Chevron* doctrine, a two-step test used by courts to determine whether a court should grant deference to an agency's interpretation of a statute.[184] Under *Chevron*, an agency regulation will be binding unless a court finds that the regulation is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[185]

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180 *See id.* at 10,884 (to be codified at 12 C.F.R. § 1024.41(a)(1)).

181 *See* 12 U.S.C. § 2605(k)(1)(E) (Supp. V 2012); Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,703.

182 *Cf.* Wright, *supra* note 114, at 164–66.

183 *Cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840–41 (1984) (interpreting the Clean Air amendments which were implemented by the EPA); Haug v. Bank of Am., N.A., 317 F.3d 832, 834–35 (8th Cir. 2003) (interpreting RESPA, which HUD had implemented); Bank of Am., N.A. v. F.D.I.C., 244 F.3d 1309, 1311, 1321 (11th Cir. 2001) (interpreting the Financial Institutions Reform, Recovery and Enforcement Act that the FDIC was charged with overseeing) ("An administrative agency should attempt to conduct its actions . . . within the statutory limits that Congress has placed on its authority."); Fed. Land Bank of Springfield v. Farm Credit Admin., 676 F. Supp. 1239, 1241–42 (D. Mass. 1987) (interpreting the Farm Credit Act which authorized the Farm Credit Administration to promulgated rules).

184 *See Chevron*, 467 U.S. at 842–43; United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); Evan J. Criddle, Chevron's *Consensus*, 88 B.U. L. REV. 1271, 1272, 1276–77 (2008) ("[W]here agency decision-making processes satisfy all of the leading rationales for deference, the Court applies *Chevron*.").

185 *Mead*, 533 U.S. at 227 (citing *Chevron*, 467 U.S. at 844).

The first step in *Chevron* is to determine whether Congress has directly spoken to an issue.[186] Congress has directly spoken to an issue when Congress's intent is clear and unambiguous.[187] If Congress's intent is clear and unambiguous, the inquiry ends and the agency interpretation is given deference only to the extent that it enacts the unambiguous congressional intent.[188] A court may use traditional tools of statutory interpretation to determine congressional intent under step one.[189] A court will reject an agency's interpretation of a statute that conflicts with congressional intent[190] or the plain language of a statute.[191]

If Congress has not directly spoken to the issue, then the court will ask if the agency's regulation is "based on a permissible construction of the statute."[192] Courts will uphold an agency regulation as a permissible construction of the statute so long as the regulation is "sufficiently rational"[193] and is not "arbitrary [and] capricious."[194] Courts rarely strike down an agency action under the second step.[195] Deference to an agency's interpretation is especially appropriate when the implementing agency is interpreting a new statute[196] or the implementing agency has primary responsibility for the underlying matter.[197] Additionally, courts look for an "express delegation of authority" to an agency to fill a statutory gap.[198] This Comment argues that the

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186 *Chevron*, 467 U.S. at 842–43.

187 *Id.*

188 *Id.*

189 *Id.* at 843 n.9.

190 Grunbeck v. Dime Sav. Bank of N.Y., FSB, 74 F.3d 331, 336 (1st Cir. 1996) (citing *Chevron*, 467 U.S. at 843 n.9).

191 Haug v. Bank of Am., N.A., 317 F.3d 832, 835–36 (8th Cir. 2003); Fed. Land Bank of Springfield v. Farm Credit Admin., 676 F. Supp. 1239, 1250 (D. Mass. 1987) (denying agency deference for issuing a regulation that went against specific criteria).

192 *Chevron*, 467 U.S. at 843.

193 Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985). *See* Home Mortg. Bank v. Ryan, 986 F.2d 372, 376 (10th Cir. 1993) (citing *Chevron*, 467 U.S. at 844)).

194 *Chevron*, 467 U.S. at 844.

195 Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 775 (2008).

196 Natural Res. Def. Council, Inc., v. Train, 510 F.2d 692, 706 (D.C. Cir. 1975); *see also* Cooper Dev. Co., v. First Nat'l Bank of Bos., 762 F. Supp. 1145, 1151–52 (D.N.J. 1991) (citing Atl. Richfield Co. v. U.S. Dept. of Energy, 769 F.2d 771, 790 (D.C. Cir. 1984)).

197 *Home Mortg. Bank*, 986 F.2d at 376 (citing *Chem. Mfrs. Ass'n*, 470 U.S. at 125).

198 *Chevron*, 467 U.S. at 843–44, 865–66; Glover v. Standard Fed. Bank, 283 F.3d 953, 961 (8th Cir. 2002) (finding Congress did expressly delegate authority to HUD when it authorized HUD to prescribe rules necessary to achieve the purposes of RESPA); *see also* Criddle, *supra* note 184, at 1275 (grounding the Supreme Court's *Chevron* analysis in five factors, including the agency as the delegated authority and agency expertise).

Regulation X amendments are substantively and procedurally valid under *Chevron*'s second step.

A. Substantive Validity

An agency regulation's substantive validity depends on whether the agency has properly interpreted the authority granted to it by Congress. The Bureau relies on three sections of RESPA, as amended by the Dodd-Frank Act, as its legal authority for promulgating the amendments to Regulation X.[199] One provision of RESPA provides, "A servicer of a federally related mortgage shall not . . . fail to comply with any other obligation found by the Bureau . . . to be appropriate to carry out the consumer protection purposes of this chapter."[200] The other two provisions permit the Bureau to "establish any requirements"[201] and "prescribe such rules and regulations"[202] necessary to achieve RESPA's purpose.

The amendments will be upheld under the first step of *Chevron* if RESPA's language shows Congress's clear and unambiguous intent. However, the amendments do not warrant agency deference under the first step of *Chevron* because neither RESPA's plain language nor statutory context reveals Congress's clear and unambiguous intent. RESPA instructs the Bureau to promulgate any rules or regulations that are necessary to carry out the statute's consumer protection purpose.[203] Typically, courts have found that broad language does not have the "precision necessary" to determine congressional intent under the first step of *Chevron*.[204] Success under step one depends on whether the language in a statute "compel[s] any given interpretation."[205]

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199 *See* 12 U.S.C. §§ 2605(j)(3), (k)(1)(E), 2617(a) (Supp. V 2012).

200 *Id.* § 2605(k)(1)(E).

201 *Id.* § 2605(j)(3).

202 *Id.* § 2617(a).

203 *Id.* §§ 2605(j)(3), (k)(1)(E), 2617(a).

204 *See* Mayo Found. for Med. Educ. and Research v. United States, 131 S. Ct. 704, 708, 711 (2011) (citing United States v. Eurodif S.A., 555 U.S. 305, 305 (2009)) (interpreting the word "student" and ultimately deferring to the Treasury Department's interpretation of FICA under the second step of *Chevron* and engaging in a multifactor analysis for the first *Chevron* step that is unique to review of tax regulation). *See also* Cuomo v. Clearing House Ass'n, 557 U.S. 519, 525 (2009) (finding that there was necessarily ambiguity in the term "visitorial powers"); Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125–26 (1985) (finding no plain meaning for "modify" where it could be interpreted both broadly and narrowly).

205 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 860 (1984). "We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress." *Id.* at 861.

Courts are permitted to use traditional tools of statutory interpretation under step one to examine whether Congress has expressed its clear intent, including examining the statute as a whole. The remaining statutory text does not illuminate an unambiguous meaning of "any . . . obligation . . . to be appropriate to carry out the consumer protection purposes of this chapter."[206] For example, RESPA's stated purpose is to provide effective disclosures, eliminate referral fees, reduce the amount homeowner's put into escrow, and modernize local land title recordkeeping.[207] RESPA's text as a whole does not address whether Congress intended for the Bureau to implement regulations about loss mitigation application procedures or contact with delinquent borrowers.[208]

The analysis moves to the second step of *Chevron*. Notably, deference to an agency's interpretation under the second step is escalated when the case involves construction "of a new statute by its implementing agency"[209] or where the agency has primary responsibility for the underlying matter.[210] For example, in *Home Mortgage Bank v. Ryan*, the Tenth Circuit noted that the Office of Thrift Supervisors' interpretation of a new loan regulation was subject to "considerable deference" since the agency had the primary responsibility for regulating savings and loans.[211] Congress delegated primary rulemaking authority over federal consumer financial protection laws, and specifically over RESPA, to the Bureau.[212] A reviewing court would give the Bureau deference based on that delegation, as in *Home Mortgage Bank*.[213]

Broad deference under the second step of *Chevron* is especially appropriate where courts find that Congress has intentionally left a statutory gap for an

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[206] 12 U.S.C. § 2605(k)(1)(E).

[207] *See* 12 U.S.C. § 2601(b).

[208] *See Chevron*, 467 U.S. at 843–44, 861–62.

[209] Atl. Richfield Co. v. U.S. Dept. of Energy, 769 F.2d 771, 789–90 (D.C. Cir. 1984); Natural Res. Def. Council, Inc., v. Train, 510 F.2d 692, 706 (D.C. Cir. 1975) (showing heightened deference to agency interpretations of new statutes even before *Chevron*). Although RESPA is not a "new" statute, it has undergone significant changes under the Dodd-Frank Act. *See e.g.*, 12 U.S.C. § 2605 (2006), *amended by* the Dodd-Frank Wall Street Reform and Consumer Protection Act § 1463, 12 U.S.C. § 2605(k) (Supp. V 2012).

[210] Home Mortg. Bank v. Ryan, 986 F.2d 372, 376 (10th Cir. 1993) (citing Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985)).

[211] *Id.* (internal quotation mark omitted).

[212] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1022, 12 U.S.C. § 5512 (Supp. V 2012).

[213] *See Home Mortg. Bank*, 986 F.2d at 376–77 (granting deference to the Office of Thrift Supervisors' interpretation based on the OTS's primary authority over savings associations).

agency with superior industry-specific expertise to fill.[214] So long as an agency's interpretation "fills a gap or defines a term" in a statute reasonably and is not in conflict with the statute's text, then a court will give deference to the agency's interpretation.[215] RESPA instructs the Bureau to carry out "any" requirements necessary to achieve the consumer purposes of RESPA, which demonstrates an explicit gap.[216] The Bureau has industry-specific knowledge, demonstrated by the economic and financial expertise it acquired upon hiring key economic and political experts and from the extensive consumer and market research it has accumulated since its inception.[217] The Bureau has chosen to fill the gap with regulations over mortgage servicers requiring communication and loss mitigation procedures. Additionally, the Bureau's amendments requiring early contact, continual contact, and loss mitigation procedures do not conflict with the plain meaning of "any regulation" appropriate to carry out consumer protection purposes.[218]

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[214] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 158–59 (2007) (considering the agency's expertise and knowledge in regulated area in awarding agency deference); Chevron U.S.A. V. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (describing the separation of expertise between judges and agencies with regard to statutory interpretation); Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 61 (2d Cir. 2004) (considering HUD's "expertise regarding the market for federally related home mortgage loans" in awarding *Chevron* deference to a HUD regulation).

[215] *Kruse*, 383 F.3d at 55 (citing Regions Hosp. v. Shalala, 522 U.S. 448, 457 (1998)); *see, e.g.*, Fla. Manufactured Hous. Ass'n, v. Cisneros, 53 F.3d 1565, 1577 (11th Cir. 1995) (deferring to HUD's interpretation of the Manufactured Housing Act where the statute required HUD to consider certain factors, but with no precise indication how, and HUD's interpretation furthered the Manufactured Housing Act's purpose).

[216] 12 U.S.C. §§ 2605(j)(3), 2617(a) (Supp. V 2012); *see, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 996–97 (2005) (finding an explicit gap in the Communications Act for the Federal Communications Commission to define "telecommunications-service offerors" where the statute's definitions made no distinctions between various interpretations); *Chevron*, 467 U.S. at 844, 865–66 (deciding Congress left a gap in the Clean Air Act for the EPA to define "stationary source"); *see also* United States v. Mead Corp., 533 U.S. 218, 219 (2001) (noting that a "very good indicator" of "*Chevron* treatment is express congressional authorizations to engage in the rulemaking . . . process that produces the regulations . . . for which deference is claimed").

[217] For example, the Bureau's director, Richard Cordray, is the former Ohio Attorney General, who recently replaced Elizabeth Warren, a bankruptcy law professor at Harvard. *See* Adam Sorensen, *Obama Passes Over Warren, Names Deputy to Run Consumer Agency*, TIME (July 17, 2011), http://swampland.time.com/2011/07/17/obama-picks-former-ohio-ag-warren-deputy-to-head-consumer-bureau/; *About Rich Cordray*, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/about-rich-cordray/ (last visited Aug 16, 2013).

[218] *Cf.* Haug v. Bank of Am., N.A. 317 F.3d 832, 835–36, 838–40 (8th Cir. 2003) (noting that HUD's interpretation of RESPA went beyond RESPA's plain meaning although the case was remanded).

Courts consider factors other than an agency's expertise at *Chevron*'s second step to determine if an agency's interpretation is reasonable.[219] For example, in *Nationwide Mutual Insurance Company v. Cisneros*, the Sixth Circuit upheld a HUD interpretation of broad language in the Fair Housing Act because HUD's regulation was directly connected to the Fair Housing Act's purpose to ensure borrowers have access to affordable housing.[220] RESPA, as amended by the Dodd-Frank Act, is focused on protecting consumers from harmful actions by mortgage servicers and establishing mortgage servicers' duties to borrowers.[221] It is no less reasonable that the Bureau's regulations of early borrower contact, continuity of contact, and uniform loss mitigation procedures are directly connected to RESPA's aim to promote consumer protection in mortgage transactions.[222]

The Bureau's interpretation of "any regulation necessary" as servicing and loss mitigation procedures, recordkeeping requirements, and delinquent-borrower contact policies should be given deference under the second step of *Chevron*. Aside from the implicit broad deference under *Chevron*'s second step, the Bureau has used its industry expertise to fill in specific gaps in an industry where it is the primary regulator. Additionally, the amendments further the consumer protection purposes of RESPA, making them worthy of a court's deference.

B. Procedural Validity

Procedurally an agency rule is valid if it meets the requirements of the Administrative Procedure Act (APA)[223] and any additional requirements expressly stated in the granting statute.[224] The Dodd-Frank Act requires Bureau

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219 *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1864 (2013) (stating that the ultimate question under *Chevron* is, "simply, whether the agency has stayed within the bounds of its statutory authority"); *see also* NSK Ltd v. United States, 217 F. Supp. 2d. 1291, 1296–97 (Ct. Int'l Trade 2002) (providing a nonexclusive list of factors a court may use during the second-step, including "the express terms of the provisions at issue, the objectives of those provisions and the objectives of the . . . scheme as a whole").

220 52 F.3d 1351, 1359 (6th Cir. 1995) (deciding regulating property insurance was directly connected to the ability to purchase a home).

221 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,709 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

222 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1400(c), 1463(a), 12 U.S.C. § 2605(k)(1)(E) (Supp. V 2012).

223 5 U.S.C. § 553 (2012); *see also id.* § 551(a) (defining "agency" and bringing the Bureau under the APA); CARPENTER, *supra* note 8, at 20.

224 *Cf.* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 974 (2005). *See generally* CHARLES H. KOCH, JR., 1 ADMINISTRATIVE LAW AND PRACTICE § 2:30 (3d ed. 2013) (describing the relationship between the APA and specific enabling acts).

rules to be issued under notice and comment rulemaking and includes three additional requirements for new consumer protection rules: (1) considering the potential benefits and costs to consumers, (2) consulting with the appropriate agencies, and (3) responding to written objections from prudential regulators in the final rule.[225] The *Chevron* doctrine must be applied to determine whether the Bureau properly interpreted these requirements when promulgating the amendments to ensure their procedural validity. The Bureau has satisfied the procedural requirements so long as its interpretation of the rulemaking requirements from the Dodd-Frank Act are "based on a permissible construction of the statute."[226]

First, the Bureau must evaluate "the potential benefits and costs to consumers."[227] The Bureau asserts in the final rule that it considered potential benefits, costs, and impacts.[228]The Bureau evaluated the potential benefits and costs of the amendments to Regulation X to satisfy the first requirement by using market data, reports, figures, and other pieces of information to evaluate the costs and benefits and comparing the potential impact of the amendments against a "pre-statutory baseline."[229]

Information used in cost and benefit analysis is permitted so long as its use is not arbitrary and capricious.[230] The information used is not arbitrary and capricious if the agency gives a logical explanation for the cost and benefit information it relies upon in promulgating a new rule.[231] The Bureau offers an explanation for all of the data sources it used to analyze the costs and benefits for each of the broad rule amendments. For example, when writing the requirements for early contact with delinquent borrowers, the Bureau considered a Freddie Mac paper to understand how timing affects borrowers'

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[225] 12 U.S.C. § 5512(b) (outlining requirements beyond the APA that the Bureau must fulfill when promulgating new rules); CARPENTER, *supra* note 8, at 20. There are also specific requirements for the Bureau when the Bureau promulgates particular rules, such as declaring certain acts unfair and abusive. *See* CARPENTER, *supra* note 8, at 22–23.

[226] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[227] 12 U.S.C. § 5512(b)(2)(A).

[228] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,844 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

[229] *Id.* at 10,845. Because the four amendments were not imposed by the Dodd-Frank Act, the pre-statute and post-statute baseline are the same. *Id.*

[230] *See* Fla. Manufactured Hous. Ass'n, Inc. v. Cisneros, 53 F.3d 1565, 1579 (11th Cir. 1995).

[231] *See id.* at 1580 (finding that HUD's reliance on data created by its own engineers was not arbitrary and capricious).

responses to servicer outreach.[232] The paper compares redefault rates for repayment plans established when borrowers were thirty days late on payments with borrowers who were sixty days late, and was used to determine the best time to contact delinquent borrowers.[233] Additionally the Bureau examined a study of complaints to the HOPE Hotline when writing the continuity-of-contact procedures.[234] The study shows that over half of the complaints concerned lost documentation and an inability to reach servicers to obtain information about their Home Affordable Modification Program modifications.[235] This study was used to show the benefits of assigning a point of contact within a servicer.[236] The Bureau's interpretation of the Dodd-Frank Act's first rulemaking requirement is not arbitrary and capricious because the Bureau offers a logical explanation for using various data and reports to study the potential costs and benefits to consumers under each of the amendments.[237]

Second, before proposing a rule and during the comment period, the Bureau must consult with the "appropriate" regulators and financial agencies.[238] In promulgating these amendments, the Bureau has consulted, or offered to consult, with the prudential regulators,[239] HUD, FHFA, the FTC,

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[232] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,856 (citing Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*, at tbl.2 (Freddie Mac, Working Paper No. 08-01, 2008)).

[233] *See id.* at 10,856; *see also id.* at 10,855.

[234] *See id.* at 10,857.

[235] *See id.* The Home Affordable Modification Program (HAMP) was implemented in 2009 and offers subsidies to servicers to provide affordable loan modifications to eligible borrowers. *See* McCoy, *supra* note 6 (manuscript at 19, 21). *See generally About HMPadmin.com*, HOME AFFORDABLE MODIFICATION PROGRAM, https://www.hmpadmin.com/portal/resources/overview.jsp (last visited Aug. 16, 2013) (describing the assistance services offered by HAMP).

[236] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,856–57 (citing GENERAL ACCOUNTING OFFICE, TROUBLED ASSET RELIEF PROGRAM: FURTHER ACTIONS NEEDED TO FULLY AND EQUITABLY IMPLEMENT FORECLOSURE MITIGATION PROGRAMS 15 (2010)). The HOPE Hotline is a twenty-four-hour telephone line that provides borrowers with free counseling and foreclosure information from HUD-certified housing counselors. *See About the Homeowner's HOPE Hotline*, HOPE NOW, http://www.hopenow.com/hotline-aboutus.php (last visited Aug 16, 2013). The Hotline is run by the Homeownership Preservation Foundation, a nonprofit organization focused on helping homeowners avoid foreclosure. *See id.*

[237] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Fla. Manufactured Hous. Ass'n, v. Cisneros, 53 F.3d 1565, 1580 (11th Cir. 1995).

[238] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1022, 12 U.S.C. § 5512(b)(2)(B) (Supp. V 2012); CARPENTER, *supra* note 8, at 20.

[239] The "prudential regulators" are collectively the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the National Credit Union Association. Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau and Prudential Regulators Issue Joint Guidance to Address Mortgage Servicer Practices that Impact

and FEMA.[240] The Bureau also "held discussions with and solicited feedback" from the U.S. Department of Agriculture Rural Housing Service, the FHA, the Government National Mortgage Association (Ginnie Mae), and the Department of Veterans Affairs regarding the potential impacts of the final rule on mortgage loan insurance or securitization programs.[241]

Each consulted agency has an integral role in federal consumer financial protection. Either it is or was formally responsible for one of three duties: (1) promulgating and enforcing consumer financial protection law,[242] (2) overseeing mortgage servicers and loan promulgation,[243] or (3) regulating housing generally.[244] Thus the Bureau did not act in an arbitrary and capricious manner when consulting with these agencies as the "appropriate" agencies.[245]

Third, the Bureau must address any written objections brought up by prudential regulators when issuing the final regulation.[246] The final rule, released on January 17, 2013, does not mention any written objections submitted by prudential regulators. The Bureau reported that it received approximately 300 comments on the Proposed Servicing Rules.[247] The comments came from consumers, community banks, credit unions, federal and state regulators, community groups, and academics.[248] The Bureau also received comments from the government-sponsored enterprises and the FHFA.[249] There is no mention of any written comments or objections by

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Servicemembers (June 21, 2012), *available at* http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-and-prudential-regulators-issue-joint-guidance-to-address-mortgage-servicer-practices-that-impact-servicemembers/.

240 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,842–43.

241 *Id.*

242 *See, e.g.*, 12 U.S.C. §§ 2601–2617 (2006) (establishing and explaining HUD's role under RESPA); *About the Federal Trade Commission*, FED. TRADE COMMISSION, http://www.ftc.gov/ftc/about.shtm (last visited Aug. 16, 2013).

243 *See, e.g.*, *Frequently Asked Questions (FAQs)*, *supra* note 24 (discussing Ginnie Mae's oversight of mortgage servicers and loan promulgation); *Home Loan Guaranty*, U.S. DEPT. OF VETERAN AFF., http://benefits.va.gov/HOMELOANS/index.asp?expandable=0 (last visited Aug. 16, 2013).

244 *See, e.g.*, *Housing Mission and Goals*, FED. HOUSING FIN. AGENCY, http://www.fhfa.gov/Default.aspx?Page=135 (last visited Aug. 16, 2013).

245 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1022, 12 U.S.C. § 5512(b)(2)(B) (Supp. V 2012).

246 *See id.* § 5512(b); CARPENTER, *supra* note 8, at 20.

247 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,705 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

248 *Id.* at 10,705–06.

249 *Id.* at 10,706.

prudential regulators. In the absence of any such written objections, the third requirement is satisfied.

The Bureau's interpretation of the Dodd-Frank Act's rulemaking requirements is not arbitrary and capricious. Because the procedure used to promulgate the amendment and the amendment's substance are valid, the amendments deserve deference as permissible interpretations of the Bureau's rulemaking power under the second step of *Chevron*.

IV. EFFECTIVENESS OF AMENDMENTS

The amendments to Regulation X show a significant departure from past government efforts to regulate mortgage servicers. As discussed in Parts I and II, regulation of mortgage servicing before the Dodd-Frank Act focused on disclosures.[250] The enforcing agencies did not have the authority to implement recordkeeping requirements. The risks posed by poor servicer behavior were not understood because "the information was not out there."[251] Additionally, government programs since the financial crisis have focused on voluntary incentive programs rather than regulations that mandate specific procedures.[252]

The amendments to Regulation X change regulatory gears because they implement the Bureau's supervisory powers over all servicers. The amendments create uniformity of standards across the mortgage servicing industry. The amendments also create uniform servicer behavior through the collection of data. These data will allow the Bureau to monitor mortgage servicers and enforce consumer financial protection law more effectively than before the financial crisis. The data collection will also allow the Bureau to refine and write new regulations by identifying problematic areas.

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250 *See supra* Parts I–II.

251 Yuki Noguchi, *New Mortgage Rules Would Limit Risky Lending*, NPR (Jan. 10, 2013, 3:24 AM), http://www.npr.org/2013/01/10/168979256/new-mortgage-rules-would-limit-risky-lending (quoting Susan Wachter, a professor of real estate finance at The Wharton School of the University of Pennsylvania).

252 *See supra* Part II.A.1.

A. *Immediate Effects*

1. *Industry Unity*

The amendments unify all mortgage servicers under a single set of regulations.[253] This is a result of the Bureau's authority over nondepository entities.[254] Previously, servicers who were not banking institutions could slip under the regulatory radar.[255] Now, however, the Bureau's extended authority and the amendments' clarification that the requirements apply to all servicers ensures compliance by all industry entities.[256] The Bureau facilitates compliance with the amendments by incorporating requirements from other institutions, such as government-sponsored enterprises and the National Mortgage Settlement.[257] Under the amendments, all servicers must implement and follow a standard set of procedures for communicating with delinquent borrowers and reviewing loss mitigation applications.[258]

Industry experts believe that industry uniformity will create better outcomes for consumers.[259] The uniformity among industry players creates fairness by providing industry-wide information about servicer activity and raising the bar for the standard of servicer procedures.[260] Additionally, uniformity will provide borrowers with common expectations and outcomes regarding communication with servicers and applications for loss mitigation options.[261]

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253 *See* Pete Mills, Senior Vice President, Residential Policy and Member Servs., Mortg. Bankers Ass'n, Remarks at the CFPB Field Hearing on Mortgage Policy (Jan. 17, 2013), *available at* http://www.consumerfinance.gov/blog/live-from-atlanta-ga/.

254 Dodd-Frank Wall Street Reform and Consumer Protection Act § 1024, 12 U.S.C. § 5514(a)(1) (Supp. V 2012); CARPENTER, *supra* note 8, at 16.

255 *See* CARPENTER, *supra* note 8, at 3, 4; Gordon, *supra* note 49; *supra* Part II.A.

256 *See* CARPENTER, *supra* note 8, at 1, 9–11, 16.

257 *See* 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,205 (proposed Sept. 17, 2012) (to be codified at 12 C.F.R. pt. 1024); *supra* Part II.B.

258 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,882–85 (Feb. 14, 2013) (to be codified at 12 C.F.R. §§ 1024.38–.41).

259 *See, e.g.*, Mills, *supra* note 253.

260 *See* John Beggins, CEO, Specialized Loan Servicing, Remarks at the CFPB Field Hearing on Mortgage Policy (Jan. 17, 2013), *available at* http://www.consumerfinance.gov/blog/live-from-atlanta-ga/.

261 *See* Mills, *supra* note 253.

2. *Data Creation*

The Bureau's supervisory function depends on the availability of data to analyze supervised entities.[262] The Bureau is responsible for implementing and supervising compliance with federal consumer protection law.[263] In order to support the rules that it promulgates, the Bureau must monitor relevant markets and consider such factors as the risks and costs associated with the purchase or use of regulated products and the understanding that consumers have of specific products and services.[264]

Under the amendments, servicers must record their communication and loss mitigation efforts with borrowers by adhering to specific timelines, making specific personnel personally accountable, and keeping borrower documents.[265] The amendments have specific recordkeeping and filing requirements,[266] including the recording of oral and written outreach efforts to delinquent borrowers,[267] the assignment of personnel to delinquent borrowers,[268] and servicer's actions in reviewing loss mitigation applications.[269]

The amendments create an observable record of servicer behavior that is subject to Bureau supervision. The files and procedures required by the Regulation X amendments are subject to Bureau examination in accordance with procedures in the Bureau's Supervision and Examination Manual.[270] Significant findings from Bureau examinations must be published in at least one report each year.[271] Prudential regulators and federal agencies that have jurisdiction over the entity can access these reports.[272]

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262 *See* CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL, at Overview 3–4, Examinations 3 (version 2, 2011) [hereinafter CFPB SUPERVISION AND EXAMINATION MANUAL].

263 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1022, 12 U.S.C. § 5512(c)(1) (Supp. V 2012).

264 *See id.* § 5512(c)(2).

265 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,882–85 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.38–.41).

266 *See id.* at 10,883 (to be codified at § 1024.38(c)).

267 *See id.* (to be codified at § 1024.39).

268 *See id.* at 10,883–84 (to be codified at § 1024.40(a)).

269 *See id.* at 10,884–85 (to be codified at § 1024.41).

270 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1022, 12 U.S.C. § 5512(c)(4)(A) (Supp. V 2012); CFPB SUPERVISION AND EXAMINATION MANUAL, *supra* note 262; *see also* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,697–98.

271 *See* 12 U.S.C. § 5512(c)(3)(A).

272 *See id.* § 5512(c)(6)(C)(i).

Requiring servicers to record their interactions with delinquent borrowers creates accountability by allowing the Bureau to identify violations of federal consumer protection laws. The Bureau is authorized to conduct investigations to determine whether any entity has violated consumer protection laws.[273] The Bureau's review of servicer action includes reviewing consumer complaints and consumer surveys.[274] The data from the amendments can be used to corroborate consumer complaints and can be reinforced through the Bureau's powers to issue subpoenas, conduct hearings, and engage in joint investigations with other federal agencies.[275]

The vesting of accountability in mortgage servicers and the Bureau's monitoring authority should lead to the efficient enforcement of federal consumer protection laws. The Bureau intends to back the new rule with its full enforcement and supervisory authority.[276] The Bureau's enforcement powers over mortgage servicers range from limiting the activities a servicer can participate in to notifying the public of violations and implementing hefty consumer relief measures.[277] Having data recording a servicer's communication with borrowers and compliance with consumer protection law allows the Bureau to implement the most effective enforcement options when it discovers instances of noncompliance.[278]

The data on servicer behavior will also allow the Bureau to identify gaps in the amendment and promulgate new regulations in the future to comprehensively regulate the mortgage servicing industry. The Bureau's Supervision and Examination Manual demonstrates a shift in regulatory focus

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[273] *See id.* §§ 5561(1), 5562(a); CFPB SUPERVISION AND EXAMINATION MANUAL, *supra* note 262, at Overview 1, 4.

[274] *See* 12 U.S.C. § 5512(c)(4)(B)(i).

[275] *See id.* §§ 5562–5564, 5566. The Bureau has set up a formal system to receive, review, track, and follow up on consumer complaints. *See generally Submit a Complaint*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/complaint/ (last visited Aug. 16, 2013).

[276] *See* Cordray, *supra* note 9 ("We will be vigilant about enforcing these rules.").

[277] *See* 12 U.S.C. § 5565. The Bureau can charge penalties for violations of federal consumer protection law up to $1 million. *See id.* § 5565(c). The Bureau's first three enforcement actions against credit card companies (Capital One Bank, Discover Bank, and American Express) for illegal practices, including misleading consumers about fees and deceptive marketing, recovered $435 million in relief for 5.75 million customers plus civil penalties of $101.5 million. *See* CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS: FALL 2012, at 7 (2012), *available at* http://files.consumerfinance.gov/f/201210_cfpb_supervisory-highlights-fall-2012.pdf.

[278] Corrective action may be taken in conjunction with other federal agencies *See* CONSUMER FIN. PROT. BUREAU, *supra* note 277, at 8 (describing a joint enforcement action against Capital One Bank with the Office of the Comptroller of the Currency after discovering noncompliance with federal consumer protection laws).

from ensuring compliance with a law to identifying consumer risk.[279] For example, if the Bureau observes the data for servicers regarding the loss mitigation application review procedures and finds that borrowers are being denied loss mitigation options in specific patterns, the Bureau may promulgate new regulations to address these patterns. The Bureau's ability to create new regulation for servicers in response to emerging patterns of behavior is especially important because conventional market forces do not incentivize the mortgage servicing industry.[280] The data accumulated by the amendments will allow the Bureau to identify consumer risk and promulgate laws to mitigate that risk.

B. Potential Gaps for Further Regulation

Despite the strong impact of the amendments on the mortgage servicing industry, Regulation X still has several gaps that the Bureau should fill with further regulation. First, the amendments do not provide borrowers with a guaranteed loss mitigation option, which may give servicers the opportunity to avoid providing borrowers affordable loan modifications. Second, the amendments do not give servicers a legal safe haven that would avoid violating provisions of the servicers' PSAs when opting to implement loss mitigation efforts. Third, the amendments explicitly preempt areas of state foreclosure law and although the amendments may lead to a decrease in the number of foreclosures resulting from the dual-track system, preemption issues may hinder this progress.

1. No Requirements for Choosing and Evaluating Loss Mitigation Options

Regulation X explicitly disclaims a requirement to provide borrowers with loss mitigation options, stating that "[n]othing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option."[281] The Regulation X amendments do not require servicers to provide delinquent borrowers with affordable loan modifications.[282] Although borrowers have the right to enforce the amendments' loss mitigation application review provisions,

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[279] LINDA GALLAGHER & AMY MATSUO, KPMG, CFPB ISSUES FIRST SUPERVISION AND EXAMINATION MANUAL—MORTGAGE SERVICING GUIDELINES INCLUDED (Nov. 2011), *available at* http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/regulatory-practice-letters/Documents/rpl-11-25.pdf.

[280] *See supra* Part I.A.

[281] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,884 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.41(a)).

[282] *See* Gordon, *supra* note 49.

to receive notice of a servicer's decision, and to appeal the denial of a loan modification, servicers are not required to provide borrowers with any loss mitigation option, far less an affordable loan modification.[283] Without proper restrictions, servicers are able to push through harmful, rather than sustainable, loss mitigation options.[284]

Servicers are able to limit what loss mitigation options are available to borrowers because servicers control the eligibility criteria for each option.[285] As discussed in Part I, servicers compare the prospective outcomes of foreclosure and various loss mitigation options through NPV calculations.[286] Section C of Part I noted that there is no standard for what should be included in an NPV calculation other than four vague factors, with no guidance as to how those factors should be weighed.[287] Under the amendments, servicers are only required to reveal the inputs for NPV calculations when a borrower has been denied a trial or permanent loan modification on the basis of the NPV calculation.[288] The Bureau has no basis to find fault with a servicer's decision to deny a borrower an affordable loan modification option if the servicer has followed all of the required procedures.

Without strong restrictions on NPV calculations and a standard methodology for loss mitigation decisions, mortgage servicers will continue to have considerable discretion to implement unsustainable loss mitigation options that are harmful to borrowers.[289] Servicers have almost exclusive discretion as to what values are entered into the NPV factors and have the flexibility to consider additional factors including recouping costs, servicer compensation, and the existence of junior liens on the property.[290] These additional factors incentivize servicers to pursue loss mitigation options that

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283 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884–85 (to be codified at 12 C.F.R. § 1024.41(a), (d), (h)).

284 *See* Thompson, *supra* note 22, at 829 ("As long as servicers can choose not to perform modification, they will, by and large, choose the path of least resistance—foreclosures and temporary modifications that strip wealth from both investors and homeowners."); *supra* Part I.C.

285 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,827.

286 *See supra* Part I.C.

287 *See* McCoy, *supra* note 6 (manuscript at 37–40); *supra* Part I.C.

288 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,897 (to be codified at 12 C.F.R. § 1024.41(d)(1) cmt. 2).

289 *See* McCoy, *supra* note 6 (manuscript at 37–40); Press Release, Nat'l Consumer Law Ctr., *supra* note 20.

290 *See* McCoy, *supra* note 6 (manuscript at 41). For further reading on the incentives of mortgage servicers, see *id.* (manuscript *passim*), Thompson, *supra* note 22, and Cordell et al., *supra* note 37.

are harmful to borrowers, such as forbearing principal payments and capitalizing arrears.[291] Under the amendments, servicers are still able to manipulate NPV formulas to justify their loss mitigation option decisions.

Although the amendments allow borrowers to enforce the review requirements for loss mitigation applications through private action,[292] the amendments to Regulation X do not go far enough to provide borrowers with access to affordable loan modifications as a form of loss mitigation. The Bureau should use its rulemaking authority to issue additional regulations to increase the certainty for borrowers to obtain affordable loan modifications. First, the new regulations should require servicers to implement affordable loan modifications for categories of homeowners for whom the foreclosure process would be most detrimental, such as the elderly, low-income families, or families suffering from an unexpected loss such as unemployment.[293]

Second, new regulations should be issued that grant the Bureau the right to review and approve servicer NPV formulae and "waterfalls." Review procedures are in place for servicers subject to The National Mortgage Settlement. Under the National Mortgage Settlement, the Bureau has the right to obtain the servicer's NPV formula.[294] However, the factor-based nature of NPV calculations means that the right to obtain the formula does little to control servicer decisions. The Bureau should have the right to prohibit the use of an NPV formula that leads to patterns of unsustainable loan modifications. Similarly, the Bureau should be able to review servicer waterfalls to emphasize principal and interest reduction efforts over detrimental modifications such as the capitalization of arrears or the extension of a loan's term.[295] Although these restrictions would conflict with PSA provisions, they would assure borrowers of the possibility to stay in their homes and become current on their mortgages.

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[291] *See* McCoy, *supra* note 6 (manuscript at 41); Thompson, *supra* note 22, at 772 ("Servicers can . . . make more money by making short-term unsustainable payment agreements than they can by making long-term, sustainable modifications.").

[292] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884 (to be codified at 12 C.F.R. § 1024.41(a)); *see* Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(f) (2006).

[293] *See* Nat'l Consumer Law Ctr. & Nat'l Ass'n of Consumer Advocates, *Comments to the Consumer Financial Protection Bureau*, NCLC.ORG 2 (Oct. 9, 2012), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/comments-cfpb-servicing-respa.pdf.

[294] Antonio F. Dias, Lee Ann Russo & Albert J. Rota, *CFPB to Play Significant Role Under Foreclosure Settlement Proposal*, JONES DAY (March 2011), http://www.jonesday.com/cfpb_to_play/.

[295] *See* Nat'l Consumer Law Ctr. & Nat'l Ass'n of Consumer Advocates, *supra* note 293, at 42–43.

2. *No Legal Safe Haven for Servicer Decisions*

The amendments do not provide servicers with a legal shield for pursuing loss mitigation options. Servicers have cited concerns with potential violations of PSA provisions for modifying too many loans in a securitized pool as one deterrent for implementing loan modifications.[296] Many scholars claim that the fear of investor lawsuits is "overblown" and there have been no suits by investors against servicers that question a servicer's decision to modify a defaultant loan.[297] Nevertheless, the lack of a legal shield from liability from investors and trustees may mean that legal advisors for mortgage servicers would suggest that servicers err on the side of caution and make loss mitigation and foreclosure decisions that align with the language in the PSAs rather than in the best interest of borrowers.

3. *Dual-Track and Preemption Concerns*

The amendments explicitly aim to restrict the dual-track system.[298] The dual-track system—which requires a servicer to proceed with the foreclosure process while considering loss mitigation options—has led to foreclosures even when borrowers thought they had successfully completed loss mitigation discussions with servicers.[299] The fourth amendment restricts unnecessary foreclosures from the dual-track system in two ways. First, it creates a 120-day buffer from taking any foreclosure action after a borrower's delinquency.[300] Second, once a borrower has submitted a loss mitigation application, even if the account is more than 120 days delinquent, a servicer cannot initiate or finalize the foreclosure process until loss mitigation options have been denied or rejected, the appeals process is exhausted, or the borrower fails to comply with the terms of the loss mitigation option.[301]

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[296] Some PSAs contain provisions that restrict the circumstances under which loans within a securitized pool can be modified. *See* THOMPSON, *supra* note 25, at 5, 6, 8 ("Servicers have claimed to fear investor lawsuits."); McCoy, *supra* note 6 (manuscript at 35–36).

[297] THOMPSON, *supra* note 25, at 8.

[298] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,698 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024); *supra* Part I.B (describing the dual-track system).

[299] *See The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Hous., Transp., & Cmty. Dev. of the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. 6, 7 (2011) [hereinafter *Hearing Before the Subcomm. on Hous., Transp., and Cmty. Dev.*] (statement of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Ctr.).

[300] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,885 (to be codified at 12 C.F.R. § 1024.41(f)(1)).

[301] *See id.* (to be codified at 12 C.F.R. § 1024.41(f)–(g)).

It is interesting that the Bureau did not eliminate the dual-track system, despite professional recommendation to do so.[302] Eliminating the dual-track system would have been complicated since credit rating agencies and PSAs generally require servicers to implement a dual-track system to maximize efficiency.[303] The Bureau could accomplish elimination of the dual-track system prospectively by mandating a change in the standard PSA language.

Although the foreclosure buffers may stop servicers from pushing through foreclosures hastily, the amendments do not guarantee that the problems and foreclosures stemming from the dual-track system will go away. During the 120-day buffer, borrowers are not required to submit loss mitigation applications, but merely told that the option is available.[304] Borrowers might not take advantage of the buffer time to pursue loss mitigation options.[305] Once the buffer has passed and none of the loss mitigation processing conditions apply, servicers are unrestricted to implement the foreclosure process.[306] At this point, a borrower's credit score takes a strong hit and administrative fees begin to accumulate, regardless of whether the process actually ends with a foreclosure.[307]

Beyond remaining complications for borrowers, the amendments complicate state law. The amendments expressly preempt portions of state real estate law.[308] States may adopt broader consumer protection regulations, but servicers must respect certain Bureau instructions, such as foreclosure timelines, regardless of applicable state law.[309] Preemption complicates

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302 *See Hearing Before the Subcomm. on Hous., Transp., and Cmty. Dev.*, *supra* note 299, at 7 ("The dual-track system must be ended.") (statement of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Ctr.); Press Release, Nat'l Consumer Law Ctr., *supra* note 20.

303 Thompson, *supra* note 22, at 795, 799.

304 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,884–85 (to be codified at 12 C.F.R. § 1024.41).

305 Servicers have reported difficulties in making contact with delinquent borrowers and have suggested that distressed borrowers may not respond to servicer outreach because the borrowers feel nothing can help them or servicer contact may accelerate losing their home. *See* Cordell et al., *supra* note 37, at 10.

306 *See* Gordon, *supra* note 49.

307 *See id.*

308 *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,877 (to be codified at 12 C.F.R. § 1024.33(d)).

309 *See id.* at 10,706 ("Specifically . . . § 1024.41(f) bars a servicer from making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, notwithstanding that state law may permit any such filing.").

foreclosure law where the 120-day buffer directly conflicts with state foreclosure statutes.[310]

It would be beneficial to have an explanation and demonstration of conformity between the Bureau's regulations and state law. The Bureau regulations render state foreclosure laws worthless for 120 days. It is unclear, and arguably unlikely, that state legislatures will react to the Regulation X amendments with changes to state foreclosure laws. Although the Bureau makes clear in the amendments that servicers must follow the foreclosure timelines in the amendments, the Bureau should issue an advisory opinion on how servicers should consider the amendments' restrictions alongside state foreclosure procedures.

Overall, the immediate effects of the amendments outweigh the potential gaps. The amendments to Regulation X represent a strong step by the Bureau in the direction of regulating mortgage servicers and protecting borrowers from unnecessary foreclosures. The amendments place the Bureau in a powerful position to track servicer behavior and the Bureau is able to use its arsenal of enforcement tools to efficiently enforce federal consumer protection law.

CONCLUSION

The Regulation X Amendments, requiring standard recordkeeping procedures, early delinquent-borrower contact, continuity of contact, and loss mitigation procedures by all servicers, demonstrate a new method of regulating mortgage servicing. The amendments create a data record of servicer behavior that allows the Bureau to efficiently enforce and, if necessary, rewrite federal consumer protection law. Although there are gaps in the uniformly applied requirements, the amendments pursue the Bureau's goals of transparency and accountability in mortgage servicing.

Importantly, the amendments to Regulation X are a legally permissible way to control mortgage servicers under the second step of the *Chevron* doctrine. Because the amendments are not contrary to the plain meaning of the statute, an assumption of deference is appropriate. A reviewing court would be required to defer to the Bureau's regulations because the servicing requirements, early contact requirements, continuity-of-contact procedures,

[310] In some states, a nonjudicial foreclosure can be completed in as little as six weeks. The states with the shortest foreclosure times are Georgia (thirty-seven days), Tennessee (forty to forty-five days) and Texas (twenty-seven days). *See Foreclosure Laws and Procedures by State*, *supra* note 72.

and loss mitigation procedures are reasonable interpretations, fulfilling RESPA's purpose to do what is necessary to protect consumers.

The amendments demonstrate a change in the government's attitude toward mortgage servicers. The amendments show that servicers are no longer seen as passive entities, but as players in the financial marketplace whose actions have distinct consequences. The amendments to Regulation X are a strong first step in controlling servicer behavior but demonstrate that the Bureau still has much to learn about the mortgage servicing industry.

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[*] Managing Editor, *Emory Law Journal*; J.D., Emory University School of Law (2014); B.A. New York University (2011). My sincerest gratitude goes to Professor Frank S. Alexander for his invaluable guidance and knowledge. I appreciated your patience, expertise, and reassurance at every step of the writing process. I want to thank the Executive Board of the *Emory Law Journal*, particularly Micah Revell and Joel Langdon, for your dedication and attention to detail. I am indebted to my friends who spent hours listening to me talk about mortgages and this process. Your words of encouragement and insightful feedback motivated me to do my best. Finally, I want to thank my incredible parents, Bob and Linda Dewar, and my sisters, McKenzie and Heather, for their unconditional love and support. You have helped me open so many doors and I could not have done this without you. Thank you.