

**AMERICAN FINANCIAL SERVICES ASSOCIATION  
CONSUMER MORTGAGE COALITION**

March 16, 2015

Ms. Monica Jackson  
Office of Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street, N.W.  
Washington, DC 20552  
[FederalRegisterComments@cfpb.gov](mailto:FederalRegisterComments@cfpb.gov)

Re: Docket Number CFPB-2014-0033  
RIN 3170-AA49  
Proposed Amendments to Mortgage Servicing Regulations

Dear Ms. Jackson:

The Consumer Financial Protection Bureau (“CFPB”) proposes a number of amendments and additions to its existing mortgage servicing regulations. Many of the existing regulations are new and in need of refinement, and the CFPB proposes several, especially for periodic statements to consumers protected by bankruptcy laws. In one area, successors in interest, the CFPB proposes expanding the scope and introduces the concept of a successor as a quasi-obligor without having assumed the mortgage loan. This is particularly troublesome and fraught with conflicts of law. In another area, concerning the Fair Debt Collection Practices Act (“FDCPA”), the CFPB proposes to revise the requirements for early intervention, but proposes different requirements based on whether the FDCPA applies, without addressing the fundamental problem that no one really knows when that law applies to mortgage borrowers.

This rulemaking raises some significant and far-reaching issues. In order to provide a thoughtful response, we assembled a group of servicers and service providers from across the industry to review the proposal. This group identified and analyzed the issues this proposal involves. We present a thorough and robust comment letter resulting from our review.

The proposal concerning successors in interest to mortgage borrowers is apparently based on complaints but without analysis or consideration of why non-borrowers, who claim to own a mortgaged property, have difficulty in establishing to servicers that they own the property. Successorship issues arise when a borrower dies or gets divorced, and when the family may be in emotional, and sometimes financial, distress. This distress can be a magnet for fraudsters looking to seize upon an opportunity to take advantage of consumers who may be distracted and especially vulnerable. A particularly worrisome aspect of the proposal is that it largely ignores the possibility that those claiming to own a mortgaged property may be nothing more than crooks. The proposal would greatly limit

servicers' ability to even assess the risks of fraud against vulnerable families, let alone permit servicers to act to prevent fraud and follow existing statutory protections.

The proposal would apply the Real Estate Settlement Procedures Act ("RESPA"), a law governing *loan settlements*, and the Truth in Lending Act ("TILA"), a *lending* law, to consumers who do not borrow, an unusual stretch. The successors in interest proposal is based on a misconstruction of a different federal statute, the Garn-St-Germain Act,<sup>1</sup> for which the CFPB does not have rulewriting authority. This law is narrowly tailored to protect lenders' ability to exercise their due on sale clauses with the exception of certain successors. The Garn-St. Germain Act, however, also reaffirms the lender's ability to deny loan assumptions if the successors are not creditworthy and to proceed with foreclosure remedies if the successor does not keep the mortgage current. The CFPB proposes to use that statute to do the opposite – prohibit the use of protected delinquency remedies and require assumptions by non-qualifying borrowers, who must immediately obtain a modification; or, even more problematic, treat successors as if they had assumed the loan when they have not.

The successors in interest proposal does not address the servicers' constraints in treating successors as borrowers when they are not. The proposal would promote fraud, would interfere with compliance with federal laws, and would present a number of operational problems. For these reasons, we must recommend that the CFPB not proceed with this aspect of its rulemaking, and instead assemble a roundtable to help the CFPB identify and understand the issues and constraints facing successors in interest.

The FDCPA aspect of the proposal appears minor on the surface – it would only concern early intervention after a delinquency. However, the FDCPA is a particularly difficult statute because it is not clearly drafted and because, while it is almost 40 years old, has never had implementing regulations. It was intended to have a very narrow scope, but, construed literally, may have a wide scope. It has long been obsolete, and has been overtaken by a number of more modern laws that provide mortgage borrowers with better protections.

While designed to protect consumers against harassment from debt collectors, the FDCPA is harmful to borrowers when applied in the mortgage servicing context because it can stop critical communications and can mislead consumers into believing their remedies in the event of error are narrow. Moreover, the FDCPA conflicts with both federal and state laws, which is a concern for mortgage servicers. The CFPB, understandably, has had difficulty working with this statute. The agency has had difficulty deciding whether consumers who exercise their FDCPA right to cease communication should continue to receive notices, such as upcoming adjustments in the rate on their mortgage loans. Of course they should. The FDCPA has no relation to servicing communications.

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<sup>1</sup> Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.

We take this opportunity to review the structure and history of the statute, and its interference with other consumer protections, to provide the CFPB with the background it needs to construe the statute in a way that prevents defaults and misleading information about consumers' rights.

The proposal to require bankruptcy statements is significantly more refined than the CFPB's earlier regulation in this area because it addresses conflicts between consumers' need for loan information and the protections of bankruptcy. We comment on the difficult issue of reflecting principal-interest breakdowns in monthly statements to Chapter 13 debtors. Chapter 13 puts some contractual provisions "on hold" during the debtor's bankruptcy plan so the debtor can catch up over time and resolve a delinquency. This creates multiple accountings. If the plan succeeds, the loan amortizes as if there had never been a default, but if it does not, the amortization reflects the default. For this reason, we do not believe the information is helpful. Bankruptcy law has in place procedures to resolve any amortization concerns. We urge the CFPB to continue to recognize that the periodic statements are not the source for all bankruptcy information and cannot be the vehicle for displaying all accounting and notifications.

We discuss additional operational concerns about bankruptcy statements, especially about the time needed to revise statements, and the treatment of loans with two borrowers, only one of whom seeks bankruptcy protection. We make suggestions about when statements should be required and who should receive them, and we suggest some refinements about their content and simplification of the exemptions.

We appreciate the long comment period the CFPB allowed in this rulemaking. Servicers are still today analyzing the proposal and will continue to need to bring matters to the CFPB's attention given that there are 94 federal bankruptcy districts with varying local treatments that have made it hard to anticipate every scenario. We strongly urge the CFPB not to rush into a final regulation, and that it remain receptive to future comment and input.

As the CFPB is well aware, mortgage servicers have been implementing new and revised federal and state laws continuously for years. The present rulemaking would create yet more revisions to implement. The proposal also has created a level of operational complexity that goes far beyond those found in the earlier servicing rules. This rulemaking is not subject to a Dodd-Frank Act<sup>2</sup> deadline as were the CFPB's earlier servicing regulations. We strongly urge the CFPB to permit the industry 24 months to implement this rulemaking. The bankruptcy statements in particular will break new ground, and will therefore require careful attention to their many novel implementation challenges.

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<sup>2</sup> Dodd-Frank Act Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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## I. SUCCESSORS in INTEREST

### A. THE CFPB HAS NOT TIED A SOLUTION TO A PROBLEM

Base on “numerous reports”<sup>3</sup> and “information”<sup>4</sup> about successors in interest who are unable to exercise rights of borrowers, the CFPB proposes a massive new layer of rigid regulations:

“The Bureau is proposing these changes because it believes, based on the information it has received from consumers, consumer advocacy groups, and other stakeholders, that successors in interest continue to have difficulty demonstrating their identity and ownership interest in the property to servicers’ satisfaction.”<sup>5</sup>

Absent is any attempt to identify *why* those claiming to be successors in interest (“claimants”) have difficulty demonstrating their ownership interests. The CFPB has not identified what causes the difficulties it is attempting to address. As we describe below, there are many reasons servicers cannot, and should not, quickly validate every claimant. Potential fraud is a significant concern.

Nor does the CFPB consider any alternatives that might prevent the difficulties from occurring in the first place, such as consumer education about the benefits of credit insurance, life insurance, and estate planning.

Nevertheless, the CFPB proposes a massive regulatory change to address a situation it appears not to understand, that would impose massive costs, and that could not work as intended. The CFPB acknowledges that the number of valid successors in interest is “only a small number[.]”<sup>6</sup> In the cost-benefit analysis of this rulemaking, the CFPB makes no mention of the fraud losses servicers would incur under the proposed regulation. The proposal would not permit servicers to take even basic steps to protect against potential fraud. As a result, the amount of fraud losses would be disproportionate to the small number of successors in interest.

#### ***1. Real Property Succession Is Legally and Factually Complex***

Some of the difficulties that successors face arise because the law of title to real property, family law, and estate law are complex and difficult for many people to manage. A

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<sup>3</sup> 79 Fed. Reg. 74176, 74182 (December 15, 2014).

<sup>4</sup> 79 Fed. Reg. 74176, 74181 (December 15, 2014).

<sup>5</sup> 79 Fed. Reg. 74176, 74182 (December 15, 2014).

<sup>6</sup> 79 Fed. Reg. 74176, 74269 (December 15, 2014).

federal regulation cannot preempt these state laws, and cannot make them any less difficult.

Some of the difficulties arise because the relevant facts are unknown: Did the deceased leave a valid will? Is this will the most recent one? Some difficulties arise because of human nature: Did the deceased really father this child? Was that divorce final before this couple got married? Some families disagree about who inherited a property. A federal regulation will not change human nature and will not eliminate these situations.

Some of the difficulties arise because people die without an estate plan, leaving family members to try to figure out who inherits the property,<sup>7</sup> or even who the servicer is. People sometimes die leaving real property to minor children. Some leave property to adult heirs who cannot repay the loan, and who are unprotected by life or credit insurance. Each of these is usually a mistake, but these do happen, and they can make life difficult for successors. A federal regulation will not stop people from making these mistakes.

## 2. *Mortgage Fraud Is a Risk*

The successor in interest proposal does not adequately consider the risks and issues that arise when a stranger claims to own a mortgaged property. Servicers are obligated to protect their borrowers, their investors, and themselves, from improper claims.

“Nonetheless, the Bureau has heard numerous reports that some servicers continue to require successors in interest to submit documents that the Bureau believes are unreasonable in light of the particular situation of that successor in interest, or in light of the laws of the relevant jurisdiction. For instance, the Bureau has heard reports that some servicers have required successors in interest to produce probate documents for estates that do not require probate.”<sup>8</sup>

This description considers only the point of view of the convenience of the claimant. The proposed successor in interest regulation fails to address the very real risk that the claimant may be a fraudster. The proposed regulation would, in some cases, explicitly prohibit servicers from requesting information that is necessary to establish the validity of a claim. Although probate may not be not required, it may occur, and it may determine who succeeds to property ownership.

As proposed, the successor in interest regulation would risk substantially increasing mortgage fraud.

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<sup>7</sup> The *Wall Street Journal* recently posted an article about a contested will of a deceased woman who, before getting divorced, named her then-husband as heir to her property, including a house that had been in her family for generations. Whether she amended her will after the divorce is the subject of litigation. Liz Moyer, [After Divorce, Separate Your Estate Plans Too](#), Wall St. J., February 20, 2015.

<sup>8</sup> 79 Fed. Reg. 74176, 74182 (December 15, 2014).



### **3. Borrower Privacy Requires Protection**

The CFPB considers the fact that claimants do not have full access to loan information as a problem to be solved. It states that claimants:

“have more difficulty than other homeowners obtaining information about the status of the mortgage loan, options for modification, and payoff information.”<sup>9</sup>

This is required by law.<sup>10</sup> Servicers cannot provide payoff quotes or any other nonpublic account information to anyone who calls and requests it. This is an important consumer protection. The CFPB does acknowledge some concerns:

“Before confirmation of the successor in interest’s identity and ownership interest, the servicer may, in some circumstances, have legitimate concerns about sharing information about the mortgage loan, crediting payments, or evaluating the unconfirmed successor in interest for loss mitigation options.”<sup>11</sup>

Servicers have more than “concerns” “in some circumstances.” It is illegal for servicers to divulge account information to claimants in *all* cases if the servicer does not know who the claimant is and that the claimant has at least some connection with the property.<sup>12</sup> Servicers also must protect against potential money laundering, as discussed below in section I.C.2.

### **4. Assuming Debt May Be a Poor Financial Decision**

Absent from the successor in interest proposal is any mention of the possibility that assuming debt might not be in the successor’s interest. If a successor can afford a mortgage of no more than \$75,000, is it necessarily wise for that successor to try to take on debt of substantially more than that amount? Is it wise for a successor who acquired a property to sign a promissory note at all? Perhaps, but not necessarily. The successor needs to weigh all reasonable options. If the successor can make loan payments without signing a note, why should the successor not consider this option?

If the successor can handle new debt, it does not follow that assuming the existing loan is the best option. Loan shopping is in order. It may be cheaper to refinance the loan at current interest rates than to assume it. If the existing loan is an ARM, the successor may

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<sup>9</sup> 79 Fed. Reg. 74176, 74182 (December 15, 2014).

<sup>10</sup> See *Regulation P*, 12 C.F.R. Part 1016.

<sup>11</sup> 79 Fed. Reg. 74176, 74182 (December 15, 2014).

<sup>12</sup> The CFPB does not propose in the present rulemaking to amend its consumer financial privacy regulation. We therefore do not comment on whether that would be appropriate. We do note that those regulations are required to be interagency and consistent, 15 U.S.C. § 6804(a)(2), so the CFPB would need to work in tandem with other regulators in making any amendments. Notice and comment would be required.

be better off with a fixed-rate loan. If it is a 30-year loan, the successor may be better off refinancing it to a 15-year loan.

If the successor inherited the property, the successor may now own two houses. Before automatically signing a new note, the successor might benefit by considering whether to sell one of the two houses to avoid new debt. If the successor has and can afford two houses, it may be better to borrow against the pre-owned house to pay off or pay down the loan on the newly-acquired house. The pre-owned house may have a lower loan-to-value ratio, or may be the successor's principal residence, both of which should make a loan on that house cheaper than a loan on the newly-acquired house.

#### **5. *The CFPB Should Identify a Problem Before Addressing It***

We agree with the CFPB that successors can face difficult situations. We do not agree that a federal regulation would resolve the difficulties.

The proposal does not consider the possibility that consumer education could reduce the difficulties that successors encounter. Credit insurance and life insurance can prevent the difficulties the CFPB seeks to address, but the CFPB does not mention this. Basic estate planning can streamline confirmation of a successor, especially for borrowers who have complicated family situations or whose potential heirs are minors. Assuming a loan may be a poor financial decision for consumers in many cases. The CFPB should consider improved consumer education as a means of addressing significant causes of successors' difficulties.

We do not believe the CFPB has identified the reasons successors face difficulties or the constraints that servicers face in working with claimants and successors. The CFPB appears to misunderstand the Garn-St. Germain Act provision on which it bases its successors in interest proposal. These factors have prevented the CFPB from identifying an approach that could address the difficulties successors encounter.

#### **B. THE PROPOSED CLAIM VALIDATION PROCEDURE IS FAR TOO RIGID**

##### **1. *Servicers Cannot Initially Advise Claimants How to Validate Their Claims***

The proposed regulation would require servicers to respond to claims from potential successors in interest, but apparently only through one request for information:

“With respect to any written request from a person that indicates that the person may be a successor in interest and that includes the name of the prior borrower and information that enables the servicer to identify that borrower's mortgage loan account, a servicer shall respond by providing the potential successor in

interest with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property.”<sup>13</sup>

This requirement would be in § 1024.36, which requires complete responses within 30 or 45 days.<sup>14</sup> It appears that the proposal would require a full response within 45 days based on identification of nothing more than the existence of the loan. The existence of the loan is public information, available to any fraudster. Based on that one item, servicers would apparently be required to state all the “documents the servicer requires” – every piece of information – to validate the claimant's identity and the claim, with no apparent ability to change what the servicer requires. Any subsequent addition to or subtraction from the initial list would apparently be a violation of § 1024.36.

If the information a claimant provides, either initially or upon servicer request, turns out to be incorrect or unexpected, the servicer may need to revise what it requires. For example, the claimant may originally tell the servicer, “My mother named me as sole heir in her will,” and the servicer could describe the information for that circumstance. If the servicer later discovers that the will had a codicil naming a co-heir, the servicer will need substantially different information. As proposed, the servicer could not base its initial response on the claimant's statement that the claimant is the sole heir because that may later prove to be incorrect.

This would require servicers to have ready a list of each piece of paper and information they might need, in every possible circumstance, and provide that upon the claimant's initial inquiry. This is problematical for several reasons:

- No such list exists. It is not possible to know everything a servicer might need.
- No such list should exist. It would be overwhelming to claimants, and would list information that, some time later, the servicer would discover it does not need.
- It is based on the assumption that what the servicer requires is based only on a need to document a claimed property transfer. This ignores the servicer's need to protect the borrower, the loan investor, and itself against erroneous or inaccurate information, and against fraud, identity theft, and other wrongdoing. This is a serious problem with the proposed successor in interest proposal.
- It appears to be based on an assumption that every piece of information the servicer receives throughout the process will be immediately and thoroughly legible and understandable, entirely accurate, and entirely consistent with all other information. This is unrealistic.

With only the loan identified, the servicer has no indication of whether the claim is valid. The servicer does not know who the claimant is, the nature of the claim, the basis for the claim, or whether the claim is or will be contested. The servicer does not even know

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<sup>13</sup> Proposed § 1024.36(i).

<sup>14</sup> 12 C.F.R. § 1024.36(d).

whether the claimant is a minor. Response would be required even if the claimant does not include a return address. If the claim is based on the death or divorce of a borrower, the servicer may not know where the borrower lived when the claim arose, meaning the servicer may not know which state's law governs the claim. The servicer will have on file the borrower's most recent reported address, but that may not be the place of residence.

Servicers can ask questions, but claimants may not know the answer. Claimants may ask the servicer questions as well, but it is important to recognize that the servicer cannot divulge nonpublic loan information due to privacy risks.

The CFPB states:

“The Bureau anticipates that many requests under proposed § 1024.36(i) will indicate the nature of the transfer of the ownership interest from the prior borrower to the successor in interest. In that case, the Bureau anticipates that servicers will respond with information that is specifically relevant to that successor in interest's specific situation.”<sup>15</sup>

It is true that claimants are sometimes very precise about the nature of their purported property rights. This precision may indicate a risk of a fraudulent claim. In other cases, a death or divorce is highly disruptive. Heirs may take a long time to figure out who the servicer is, such as where a borrower elected electronic communications only, but the family does not know the computer and account passwords.

Several rounds of communication are necessary in all or almost all cases. Even when claimants assert one precise type of transfer, servicers may need to explore the possibility that the claimant may be mistaken or may have overlooked other possibilities. For these reasons, servicers need to begin the claim validation process by asking basic questions to focus the inquiry. After receiving some basic responses, servicers can follow with more focused and more detailed questions. As information from a claimant accumulates, the servicer may need to add to or change what it needs.

We recommend that the CFPB start by creating a model form for the first iteration of servicer requests for information from claimants. If the CFPB does provide one, we recommend that servicers be permitted to ask its questions orally or by phone, and retain the safe harbor for use of CFPB model forms.<sup>16</sup>

We include a model form below for the CFPB's consideration. It illustrates how underdeveloped the servicer's information about a purported transfer is initially, and the impossibility of confining inquiries about claimed property ownership to a “one-size-fits-

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<sup>15</sup> 79 Fed. Reg. 74176, 74192 (December 15, 2014).

<sup>16</sup> Dodd-Frank Act § 1032(d), 12 U.S.C. § 5532(d).

all” procedure. This form represents just the initial type of questioning that will be required, and does not identify or assess the risks of inaccurate or fraudulent information, missing information, or conflicting responses. The first round may not identify who will acquire the property because that may not be known at that early stage of an inquiry.

We expect that valid but unconfirmed successors will not be able to answer the questions at first. They may not yet know an estate’s assets and liabilities or whether there was credit or life insurance. They may not have decided whether they want to sell the property, assume the loan, refinance the loan, or otherwise pay the loan in full. This can be a difficult set of questions and decisions for a family after emotional trauma and during financial uncertainty.

The proposal to permit servicers only one opportunity to ask a claimant for information is unworkable. There can not be a fixed number of inquiries because each case presents unique and unpredictable circumstances.

**CFPB – Model Form – Transfer Questionnaire**

Date

Name/Address

Re: Transfer of Property/Potential Successor-In-Interest

Mortgage Loan Account # \_\_\_\_\_

Property Address: \_\_\_\_\_

Dear \_\_\_\_\_:

Thank-you for your recent [call/letter/inquiry] regarding the [actual/pending/possible] transfer of an interest in the Property identified above. We need your cooperation in providing [Servicer] with information about this Property transfer, and we need your assessment of what will happen to the Mortgage Loan Account identified above.

Before [Servicer] can recognize you (or anyone else) as a Successor-In-Interest having an ownership interest in the Property, [Servicer] needs answers to certain questions below. This will assist [Servicer] in determining what information and documents are needed before [Servicer] can recognize someone as a Successor-In-Interest.

Note: All further written communication regarding the transfer of the Property must be sent to the following Designated Address:\_\_\_\_\_. When you write us, please refer to the Mortgage Loan Account Number appearing at the beginning of this letter so we will know who you are.

**Contact Information**

[Servicer] needs to verify who you are before [Servicer] provides you with specific information about the Mortgage Loan.

1. Who are you and what is your ownership interest in the Property, if any?

2. Did you contact [Servicer] because you believe that you are a potential Successor-In-Interest to the Property?  Yes  No

3. Are you a non-owner (e.g., Executor of an estate) that contacted [Servicer] on behalf of another person?

Yes  No

If you contacted [Servicer] on behalf of another person, please provide the name, address, and contact information for that person. \_\_\_\_\_

4. Is there more than one potential Successor-In-Interest?  Yes  No  Unknown

If yes, please provide the name, address, and contact information for each potential Successor-In-Interest

\_\_\_\_\_

### **Transfer of Property**

#### **I. Death of Borrower**

Is the Property being transferred as a result of the Death of a Borrower on the Mortgage Loan identified above?  Yes  No

A. If no, skip to the applicable topic listed below.

B. If yes, please respond to the following:

1. Is the transfer of the Property related to someone inheriting the Property from the Deceased?
  - a. If yes, please provide the name, address, and telephone number of this person and specify how he/she/they are related to the deceased (e.g., spouse, child).
  - b. Is the person inheriting the Property as a Joint Tenant? If so, please send copies of documents that reflect this tenancy.
  - c. Does the person inheriting the Property have an Affidavit of Heirship?  
 Yes  No  
If so, please send a copy of the Affidavit of Heirship.
  - d. In what state did the Borrower reside at the time of death?
2. Will someone purchase the Property from the deceased's Estate?  Yes  No
  - a. If yes, please provide the buyer's name, address, and telephone number.
  - b. Is the buyer related to the deceased?  Yes  No
  - c. If yes, please identify how (e.g., spouse, child).
3. Please send a copy of the Death Certificate
4. If there is an Estate, who is the Executor of the estate? Please provide the Executor's name, address, and telephone number.
5. Are there any legal proceedings (e.g., probate) involving the Property in a local Court?  
 Yes  No
  - a. If No – Who is managing the assets and affairs of the deceased? Please provide the name, address, and telephone number.
  - b. If yes – Please provide: Name of Court: \_\_\_\_\_  
Case #: \_\_\_\_\_  
Letters of Administration  
Recorded Final Distribution Deed (when available)

#### **II. Divorce or Legal Separation**

Is the Property being transferred as a result of the Divorce or Legal Separation of a Borrower on the Mortgage Loan identified above?  Yes  No

A. If no, skip to the applicable topic listed below.

B. If yes, please respond to the following:

1. Is the transfer of the Property related to someone acquiring an ownership interest in the Property as a result of the Divorce or Legal Separation?
  - a. If yes, please provide the name, address, and telephone number of this person.
  - b. Is the Divorce or Legal Separation final?  
 Yes  No

If yes, please send a copy of the Divorce Decree or Legal Separation agreement.

c. In what state was the Divorce entered or the Legal Separation entered into?

2. Will the Property be the principal residence of the Borrower?  Yes  No

a. Will the Property be the principal residence of the new owner?  Yes  No

### III. Living Spouse or Relative

Is the Property being transferred as a result of transfer of the Property to a living Spouse or Relative of the Borrower on the Mortgage Loan identified above?  Yes  No

If no, skip to the Mortgage Loan Account topic below.

1. If yes, please provide the name, address, and telephone number of each of these persons, and specify how each is related to the deceased (e.g., spouse, child, or other relative).
2. How did or will the Spouse or Relative acquire an interest in the Property?
  - a. If there is a written document of this transfer, please send a copy of it (e.g. deed, contract).
  - b. What was or will be the date of transfer?
3. Will the Property be the principal residence of any person acquiring the Property?
  - a. If so, which person or persons?

### Mortgage Loan Account

In addition to understanding the circumstances of the transfer of the Property, [Servicer] also needs to understand what is going to happen with the Mortgage Loan that is secured by a lien on the Property. By answering the questions below [Servicer] will have a better understanding of what is going to happen.

1. Will the Mortgage Loan be paid off as a result of the transfer of the Property?
  - a. If yes, provide explanation: \_\_\_\_\_
2. Will someone want to assume the Mortgage Loan?
  - a. If yes, provide explanation: \_\_\_\_\_
3. Will someone want to refinance the Mortgage Loan?
  - a. If yes, provide explanation: \_\_\_\_\_
4. Is there an immediate need for Financial Assistance (e.g., loan modification) as a result of the transfer of the Property?
  - a. If yes, provide explanation: \_\_\_\_\_

[Servicer] appreciates your cooperation while we work with you to determine whether we may treat you and/or another person as a Successor-In-Interest interest in the Property. Until someone is confirmed to be a Successor-In-Interest, we are limited in the information that we can provide.

Our determination does not mean a particular person does or does not own the Property. It affects only how we treat the Property with respect to the Mortgage Loan Account. If you are unsure about your legal rights, you might want to consult an attorney.

Enclosed is an envelope for returning this “Transfer Questionnaire” and any applicable documentation. Upon receipt of this information, [Servicer] will review and determine whether we have sufficient information to recognize someone as a Successor-In-Interest of the Property identified above. We may need additional information or documentation from you or from another person. [Servicer] will contact you if we need additional information from you.

If you have any questions about this Transfer Questionnaire, you may contact [Servicer] as follows:  
[Phone/Email]

## 2. *Servicers Do Not Control How Long Validation Takes*

Proposed comment 38(b)(1)(vi)-3 provides:

“In general, a servicer’s policies and procedures must be reasonably designed to ensure that the servicer confirms a successor in interest’s status and notifies the person of the servicer’s confirmation at least 30 days before the next applicable milestone provided in comment 41(b)(2)(ii)-2.”

Servicers cannot adopt such a procedure because they rely on claimant and third party responses, and because they need to protect against potentially invalid claims.

Servicers are at the mercy of claimants and third parties for the necessary validation information. If claimants and third parties are not timely, servicers have no choice but to wait or to deny the claim. For example, a servicer may ask a borrower about the validity of a claim, as a reasonable method of verification. However, the borrower may not respond because the borrower is out of town or incapacitated. A servicer may reasonably try to validate a claimed legal separation by contacting the spouse, but the spouse may uncooperative and affirmatively decide not to provide validation information.

Importantly, in all cases servicers need to protect their borrowers, investors, and themselves, against potentially invalid claims. If a family is squabbling about an inheritance, the family members may provide inconsistent information, which may require additional verification steps. If a claimed transfer allegedly occurs shortly after a “borrower” sends the servicer an address change, additional verification may be appropriate. A will signed and notarized before three witnesses may present less risk than a will signed before two witnesses without a notary. A holographic will may present unpredictable risks. Electronic information may present a different type or severity of risks than paper information. Documents that appear “official” but that are photocopies may present a different risk profile than original documents with an official seal. Sometimes a borrower will have a different name at death or at divorce than the name the servicer has on record for the same person. Not all name changes are reflected in legal records – sometimes people simply begin using a new name, and this may vary the risks relating to a name change. If an estate is at risk of being litigated, it may be necessary for the servicer not to determine a claim before the time for filing a challenge has elapsed. If there is a challenge, servicers may need to wait until the litigation concludes before determining a claim. This is not common, but it does happen.

There is not one validation “check list” that servicers can use in all seemingly similar cases. The amount, type, and timing of the necessary verification depends on many facts and circumstances, and varies from case to case. It depends on each indicator of risk, and it depends on the nature and severity of the risk that each indicator presents. The servicer needs to weigh the risks and needs to adjust its verification plan and steps to meet the



*individual* risk profile of each alleged transfer. The proposal to require each servicer to decide each claim based on the timing of a loss mitigation process, and that process alone, wholly disregards the servicer's significant legal obligation to protect its borrowers, investors, and itself. *The proposal would not permit servicers to adjust their verification steps to meet the risks of error or wrongdoing that the circumstances of each claim present.* Servicers simply cannot adopt such a procedure.

*In no event* should servicers be required to decide a claim is valid before the servicer has a sufficient basis for that determination. That would be an invitation to fraud.

Any successor in interest procedure needs to be independent of §§ 1024.35 and 1024.36, and needs to have no deadline by which a servicer must act. If there is a deadline and a servicer does not have sufficient time or information to make a safe and sound determination by the deadline, the servicer would have no choice but to deny the claim. We do not believe this would be appropriate.

The CFPB bases its proposal on a desire to have successors confirmed quickly so they can pursue loss mitigation, but would require the same expedited procedures for claimants who cannot or will not do so. This would be regulation without reason.

In all cases, any procedures regarding successors in interest need to permit servicers to adjust their actions according to the actual and potential risks of illegal activity or erroneous information.

### ***3. Regulation X Should Not Limit the Information a Servicer May Require***

Proposed comments under 38(b)(1)(vi) list examples of documents a servicer “may require” to validate a claim. Ownership of real property is determined by state law, not by a federal regulation under a federal statute that has nothing to do with property ownership. What is required to document ownership can only be determined under state law. We urge the CFPB not to write a regulation that could conflict or interfere with state law.

The proposal is especially worrisome in that it would prohibit servicers from requesting or requiring certain information based only on the convenience of a claimant, with no regard whatsoever for the possibility of wrongdoing or innocent error. This lack of protection would create a new type of mortgage fraud, and would not permit servicers to protect against it.

The proposed commentary gives examples of what a servicer would and would not be able to require, as follows.

Proposed comment 38(b)(1)(vi)-2.i provides:

“To demonstrate that the potential successor in interest has sole interest in the property upon the death of the prior borrower, applicable law does not require a probate proceeding, but requires only that there be a prior recorded deed listing both the potential successor in interest and the prior borrower as tenants by the entirety (e.g., married grantees) or joint tenants. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the recorded instrument, if the servicer does not already have it, and the death certificate of the prior borrower. Because in this situation a probate proceeding is not required under applicable law, however, it would not be reasonable for the servicer to require documentation of a probate proceeding.”

This example does not permit the servicer to protect the borrower, the investor, or itself against the possibility that the claimant may be a fraudster; that the death certificate may be false or faulty; that a third party may claim an adverse ownership interest; that tenants by the entirety may have divorced; or that there may be a probate proceeding.

The proposed commentary, in the language quoted above and in the language discussed below, appears to prohibit servicers from requesting probate documents unless probate is explicitly required by applicable law. We must object. A probate proceeding may occur even when it is not required by law. Competing claims to a property are always possible. Servicers need to be able to ask whether there is or may be a probate proceeding to check for potentially competing ownership claims, and this should be an easy question for a claimant to answer. If there is a probate proceeding, the servicer needs to be able to request probate documents to verify ownership.

We also object to the proposal to limit the inquiries a servicer would be permitted to make. The first claimant to a property who reaches the servicer may seek to convince the servicer that that claimant is the sole owner of a property, then use the servicer’s determination to persuade other persons not to pursue their potential rights to ownership. Servicers cannot always confirm whichever claimant first appears.

Proposed comment 38(b)(1)(vi)-2.ii provides:

“A potential successor in interest indicates that he or she acquired an ownership interest in the property upon the death of the prior borrower as a result of an affidavit of heirship. To demonstrate that the potential successor in interest has an interest in the property upon the death of the prior borrower, applicable law does not require a probate proceeding, but requires only an appropriate affidavit of heirship upon death. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the affidavit of heirship and the death certificate of the prior borrower. Because a probate

proceeding is not required under applicable law, however, it would not be reasonable for the servicer to require documentation of a probate proceeding.”

In this example, the servicer needs to protect the borrower, the investor, or itself against the possibility that the claimant may be a fraudster; that the affidavit may be inaccurate, intentionally or otherwise; that the death certificate may be false or faulty; that a third party may contest ownership; and that there may be, or should be, a probate proceeding.

To the extent this comment implies that a servicer should recognize a transfer of ownership in real property based on two pieces of paper that any fraudster can produce, with no further investigation, we strenuously disagree.

Proposed comment 38(b)(1)(vi)-2.iii provides:

“A potential successor in interest indicates that he or she acquired an ownership interest in the property from a spouse who is a borrower as a result of a property agreement incident to a divorce proceeding. Under applicable law, transfer from the borrower spouse is demonstrated by a final divorce decree and accompanying separation agreement executed by both spouses. Applicable law does not require a deed conveying the interest in the property. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the final divorce decree and an executed separation agreement. Because applicable law does not require a deed, however, it would not be reasonable for the servicer to require documentation of a deed.”

This does not consider the possibility that the original owner may attempt to sell the property after the divorce, without telling the former spouse about the attempted sale, and without telling the attempted buyer about the divorce. The servicer needs to be able to require a recorded instrument to protect against that possibility. This would protect the successor as well as the servicer.

Proposed comment 38(b)(1)(vi)-2.iv provides:

“A potential successor in interest indicates that he or she acquired an ownership interest in the property from a living spouse or parent who is a borrower by quitclaim deed or act of donation. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the quitclaim deed or act of donation. It would not be reasonable, however, for the servicer to require additional documents.”

This does not consider the possibility that the claimant may be a fraudster; that the quitclaim deed may be incorrect, intentionally or otherwise; or that the alleged transfer may be not the only transfer. Servicers cannot comply with the proposed prohibition on requiring *any* additional documents.

In each of these examples, a servicer who took entirely appropriate steps to protect the borrower, the investor, or itself would be in violation of Regulation X. If Regulation X were too restrictive of a servicer's ability to determine ownership or to prevent fraud, servicers would need to consider rejecting even apparently valid claims, for fear of violating Regulation X.

RESPA and Regulation X are not suited for determining how servicers can and cannot determine ownership to real estate under state law, while protecting against error, fraud, and wrongdoing. A Regulation X provision that *prohibits* a servicer from requiring a claimant or third party to produce particular evidence of ownership is not workable. Property transfers, and potential wrongdoing or error, take many shapes and forms. Servicers can only determine the information they need based on an overall assessment of the risks of each individual alleged transfer.

Even if Regulation X were to create a standard of reasonableness as to the information servicers can and cannot require, servicers would face litigation risk for requesting a document that someone later challenges as unreasonable. This possibility would force servicers to ask only what they know they will be able to justify in court. Servicers would need to establish a procedure for weighing and documenting the reasonableness of each request before making it. This would also require servicers to document what they know at the time they make a request, so that information they acquire later would not create liability for an unreasonable request. A need for so much documentation would slow the claim validation process. In case of doubt, rather than risk a violation, servicers would need to deny the claim of ownership.

The existing requirement that servicers have reasonable policies and procedures in place to promptly identify and facilitate communication with potential successors in interest is a more workable approach. It needs to permit servicers:

- Flexibility to protect their safety and soundness on a case-by-case basis.
- To protect against risks of erroneous and invalid claims, and against potential illegal activity.
- To determine what state law requires or may require.
- To request and require any documentation the servicer believes necessary or helpful to document property title, including:
  - Probate documents;
  - Recorded instruments reflecting property transfers;
  - Whether any transfer or recording taxes were properly paid;
  - Whether there may be persons unknown to the claimant or to the servicer with potential claims; and
  - Information helpful in assessing and reacting to *all* potential risks of error, wrongdoing, or competing claims.

- To permit servicers to request, and require, reasonably relevant written statements and attestations from any persons, such as claimants and potential claimants.

**4. *The Proposal Would Not Permit an Abbreviated Process Where Appropriate***

Sometimes a paper-intensive process can be avoided if the borrower has or had credit insurance or life insurance, or has a buyer for the property. In this situation, the claimant and servicer may agree to simply wait until the insurance or sales proceeds are available. The servicer's risk of fraud may be reduced if the loan is expected to be paid off soon. If the CFPB does finalize a regulation requiring specific procedures, servicers should have the flexibility to sidestep those procedures when they are an unnecessary hindrance.

**5. *Servicers Need to Verify a Claimant's Identity and Majority***

Servicers cannot provide nonpublic account information before claimants authenticate their identity and their right to access the information. The servicer must wait for the claimant to provide information, and the servicer may need to conduct a risk-based verification of the claimant's information. For this reason, we support proposed comment 36(i)-1, which would permit servicers not to provide all requested information before the servicer is able to confirm the claimant's identity and ownership interest.

We recommend that the CFPB make clear that it will not require servicers to enter into contracts with claimants who are or may be minors.

The CFPB solicits comment on “whether certain parts of § 1026.36(c) [payment processing and payoff statements] should apply with respect to successors in interest even if the servicer has not confirmed the successor in interest's identity and ownership interest in the dwelling.”<sup>17</sup> Providing loan disclosures to an unconfirmed owner could be a privacy breach and a fraud risk, and should not be required unless it would be permissible under Regulation P and under the Gramm-Leach-Bliley Act<sup>18</sup> (“GLBA”) information security standards.<sup>19</sup>

The prior borrower (or estate) remains a borrower until released from the loan obligation, and can request and receive a payoff quote or other account information, and can request error resolution, just as any other borrower.

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<sup>17</sup> 79 Fed. Reg. 74176, 74236 (December 15, 2014).

<sup>18</sup> Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

<sup>19</sup> GLBA § 501(b), 15 U.S.C. § 6801(b), implemented at 12 C.F.R. Part 30 Appendix B (OCC); 12 C.F.R. Part 208 Appendix D-2 and Part 225 Appendix F (Federal Reserve); 12 C.F.R. Part 364 Appendix B (FDIC); 12 C.F.R. Part 748 Appendix B (NCUA); 16 C.F.R. Part 314 (FTC); 17 C.F.R. § 160.30 (CFTC); and 17 C.F.R. § 248.30 (SEC).

C. FEDERAL LAWS RESTRICTING CLAIM VALIDATION

I. *Bank Secrecy Act Customer Identification Requirements*

When a servicer is able to satisfy its standards for verifying the claimant's identity and that the claimant is the successor in interest to the borrower, it does not necessarily follow that the servicer can treat the successor as a borrower.

Shortly after September 11, 2001, Congress passed the USA PATRIOT ACT,<sup>20</sup> which, among other things, created and strengthened laws to combat terrorism financing, money-laundering, concealment of money laundering, and financial crimes generally. The Patriot Act amended the Bank Secrecy Act to require financial institutions to verify the identify of customers who seek to open accounts. The Patriot act requires:

“[Interagency] regulations shall, at a minimum, require financial institutions to implement, and customers (after being given adequate notice) to comply with, reasonable procedures for—  
(A) verifying the identity of any person seeking to open an account to the extent reasonable and practicable[.]”<sup>21</sup>

The intent is to keep certain people from accessing the U.S. financial system.<sup>22</sup> This customer identification program (“CIP”) requirement applies to financial institutions defined very broadly. The requirement is risk-based, meaning that there is not one uniform set of required procedures. The requirement for banks, for example, requires:

“The CIP must include risk-based procedures for verifying the identity of each customer to the extent reasonable and practicable. The procedures must enable the bank to form a reasonable belief that it knows the true identity of each customer. These procedures must be based on the bank's assessment of the relevant risks, including those presented by the various types of accounts maintained by the bank, the various methods of opening accounts provided by the bank, the various types of identifying information available, and the bank's size, location, and customer base.”<sup>23</sup>

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<sup>20</sup> Pub. L. No. 107-56, 115 Stat. 272 (2001) (the “Patriot Act”).

<sup>21</sup> Patriot Act § 326(a), 115 Stat. 272, 317 (codified at 31 U.S.C. § 5318(l)(2)).

<sup>22</sup> “Just like we are tightening our border controls to restrict access to the United States across its physical borders, the bill's anti-money laundering provisions will tighten our financial controls to restrict access into the U.S. financial system. They will require our financial institutions to take new steps, to do more work, and to exercise greater caution before opening up the financial system of the United States.” 147 Cong. Rec. 20716 (October 25, 2001).

<sup>23</sup> 31 C.F.R. § 1020.220(a)(2). See also 31 C.F.R. Part 1029 for similar requirements for nonbank lenders.

The CIP must provide for the possibility of not opening an account:

“The CIP must include procedures for responding to circumstances in which the bank cannot form a reasonable belief that it knows the true identity of a customer. These procedures should describe:

- (A) When the bank should not open an account;
- (B) The terms under which a customer may use an account while the bank attempts to verify the customer's identity;
- (C) When the bank should close an account, after attempts to verify a customer's identity have failed[.]”<sup>24</sup>

Servicers must sufficiently identify claimants under the standards of the Bank Secrecy Act. Customer identification determinations are very fact-specific. Servicers need to be able to decline to recognize a claimant as a borrower, where appropriate. Any CFPB regulation needs to permit servicers to comply with the Bank Secrecy Act and its implementing regulations.

## **2. *Anti-Money Laundering Requirements***

The Patriot Act also amended the Bank Secrecy Act to require financial institutions to establish anti-money laundering programs.<sup>25</sup> Even before the Patriot Act, financial institutions have been required to report suspicious activities. These include transactions, or attempted transactions, if the financial institution knows, suspects or has reason to suspect that the:

“transaction involves funds derived from illegal activities . . . or . . . has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.”<sup>26</sup>

If a servicer suspects that a successor may derive its funds for repaying the loan from illegal activity, the servicer cannot “look the other way” and potentially abet the activity. Servicers cannot blindly cash every check they receive. Anti-money laundering and source of funds issues are very fact-specific. Any CFPB regulation needs to permit servicers to protect against potential money laundering and other potential financial crimes.

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<sup>24</sup> 31 C.F.R. § 1020.220(a)(4)(iii).

<sup>25</sup> Patriot Act § 352, 115 Stat. 272, 322 (codified at 31 U.S.C. § 5318(h)).

<sup>26</sup> See, e.g., 12 C.F.R. § 21.11 (OCC regulations).

D. ASSUMPTIONS AND LOSS MITIGATION ARE SEPARATE ACTIONS

One of the CFPB's objectives in this rulemaking is to empower successors to seek loss mitigation. From a CFPB December 4 news announcement:

“The proposal would also help ensure that surviving family members and others who inherit or receive property have the same protections under the CFPB's mortgage servicing rules as the original borrower.”

From the proposal:

“The Bureau has also heard numerous reports that successors in interest often encounter difficulties being evaluated for loss mitigation options, including that servicers often require successors in interest to assume the mortgage loan obligation under State law before evaluating the successor in interest for loss mitigation options. This practice appears to contravene Fannie Mae and Freddie Mac requirements that, for loans governed by Fannie Mae or Freddie Mac guidelines, servicers must evaluate successors in interest for loss mitigation options prior to processing an assumption.”<sup>27</sup>

This is not an accurate description of loss mitigation in a Garn-St. Germain transfer. Servicers as well as Fannie Mae and Freddie Mac (the “GSEs”), according to Garn-St. Germain, accept the protected successor's ownership upon confirmation of the successor's interest and identity and do not enforce a due-on-sale clause, regardless of the successor's ability or inability to repay the loan, and without underwriting the successor's credit profile.

When a servicer confirms a claimant as a successor, and only in that event, a question arises about whether the person the CFPB calls the “prior borrower” or “prior consumer” is released from liability under the loan obligation. Until released, that “prior” borrower is a current borrower legally obligated on the loan under state law. Until the successor assumes the loan, this “prior” borrower is the only borrower on the loan. The GSEs permit a release from the loan if the successor qualifies for and agrees to assume the loan. In this case, an assumption and release are permissible, and loss mitigation is not necessary.

If the successor may qualify for loss mitigation, servicers do pursue loss mitigation even without an assumption.<sup>28</sup> However, loss mitigation is often available only to borrowers.

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<sup>27</sup> 79 Fed. Reg. 74176, 74183 (December 15, 2014), citing in footnote 38 Fannie Mae Servicing Guide Announcement [SVC-2013-17](#) (August 28, 2013); and Freddie Mac Bulletin [2013-3](#) (February 15, 2013).

<sup>28</sup> “Non-borrowers who inherit or are awarded sole title to a property may be considered for HAMP even if the borrower who previously owned the property was not already in a TPP [trial payment plan]. Such titleholders may be considered for HAMP if they meet all applicable eligibility criteria. In this case, servicers should collect an Initial Package from the non-borrower who now owns the property and evaluate



For example, HAMP Tier 1 is available only for loans on the borrower's principal residence. HAMP Tier 2 is available only for loans on a property that the borrower or the borrower's family occupies, or that the borrower rents to a tenant as the tenant's principal residence. Assuming the loan often greatly expands the types of loss mitigation available to the successor.

If a loan modification is in a trial payment plan when the property ownership transfers, and the trial plan then successfully runs its course, someone will need to sign the permanent loan modification agreement – a loan modification requires a borrower's consent. If the successor is the party who qualifies for a modification, the successor will need to assume the loan to accept the permanent modification. HAMP for these reasons provides:

“If, during a TPP, a servicer learns that a non-borrower occupant or non-borrower non-occupant has inherited sole title to the property upon the death [or divorce] of the borrower . . . the servicer must send written notice to the new titleholder describing the requirements for assuming the note, subject to applicable law and investor guidelines, and the impact of a potential assumption on the TPP and the borrower's continued eligibility for assistance under MHA. . . . If assumption is not permissible under applicable law or investor guidelines, or the titleholder does not meet HAMP eligibility criteria, the servicer must terminate the TPP and send written notice to the remaining non-borrower occupant of the termination and information about other loss mitigation options available.”<sup>29</sup>

The proposed regulation would require confirmed successors to be treated as borrowers so they would be eligible for loss mitigation.<sup>30</sup>

“The Bureau believes that it is especially important for the loss mitigation procedures in § 1024.41 to apply to successors in interest. . . . Further, because a servicer's acknowledgment of a successor in interest's subsequent assumption of the mortgage loan under State law is not subject to the Regulation Z Ability-to-Repay Rule, successors in interest are particularly dependent on a prompt loss mitigation evaluation to assess the mortgage loan's affordability. . . . The Bureau therefore believes that requiring servicers to evaluate a complete loss mitigation application received from a confirmed successor in interest supports the successor

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the request as if he or she was the borrower. The servicer should process the assumption and loan modification contemporaneously if the titleholder is eligible for HAMP and investor guidelines and applicable law permit an assumption of the loan.” HAMP Handbook Ch. II § 8.8, *Consideration of Non-Borrowers Following Death or Divorce*.

<sup>29</sup> HAMP Handbook Ch. II § 8.9.2, *Remaining Non-Borrowers*.

<sup>30</sup> Proposed 12 C.F.R. § 1024.30(d), for purposes of §§ 1024.30 – 1024.41; proposed § 1026.2(a)(1), for all of Regulation Z.

in interest in making a fully informed decision about whether to assume the mortgage loan obligation under State law.”<sup>31</sup>

It is not clear whether the CFPB proposes to require servicers to permit confirmed successors in interest to assume the pre-existing loans on their property, or if so, in what circumstances. There would be a number of issues with such a proposal.

**1. Does the CFPB Propose to Require Assumptions?**

Some mortgage contracts permit a new borrower to assume the loan, but only on the condition that the new borrower “credit-qualify,” meaning meet loan origination credit standards. Does the CFPB propose to override contractual language?

Even when a loan is not explicitly assumable, an investor may agree to permit an assumption. Does the CFPB propose to require assumptions when the successor does not meet investor requirements for assumptions?

RESPA, TILA, and the Garn-St. Germain Act never require loan assumptions. *See* the discussion below about the CFPB’s questionable statutory authority for its successors in interest proposal.

**2. Loss Mitigation Timing if a Successor Wants to Assume the Loan**

The CFPB does not propose new loss mitigation timing requirements for successors who want to assume the loan to qualify for loss mitigation. This is important because an assumption requires a complete loan application and full underwriting. For example, HAMP provides:

“Based on the amount of time required to complete the assumption, the servicer may extend the existing TPP, as appropriate under HAMP guidance, or terminate the existing TPP and place the loan in a forbearance plan for a period the servicer deems sufficient to both complete the assumption and re-evaluate the new titleholder for HAMP. Servicers may not initiate or continue foreclosure proceedings during the period provided for the new titleholder to attempt to assume the note and re-apply for HAMP.”<sup>32</sup>

Under HAMP, servicers, not applicants, determine how long the loan applicant has to complete the loan application. This is appropriate.

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<sup>31</sup> 79 Fed. Reg. 74176, 74183-84 (citation omitted) (December 15, 2014).

<sup>32</sup> HAMP Handbook Ch. II § 8.9.2, *Remaining Non-Borrowers*.

The CFPB proposes to permit servicers not to review claimants' loss mitigation applications until after confirming their claim. Thereafter, the servicer must review the application under § 1024.41 "as if it had been received on the date the servicer confirmed" the successor.<sup>33</sup> We are concerned that, taken in conjunction with proposal that servicers "promptly" determine successorship claims,<sup>34</sup> the CFPB will find servicers in violation of Regulation X when a successorship claim is not determined quickly because the case is difficult, the servicer requires information the claimant or a third party has not provided, or because the servicer needs to assess and manage potential risks. That could prompt servicers to deny successorship claims for fear of an unavoidable Regulation X violation.

If the successor must assume the loan to qualify for some types of loss mitigation, the following questions arise:

- Could the servicer or investor consider the successor only for loss mitigation that does not require an assumption, with or without prior borrower request?
- Could the servicer or investor require the prior borrower or successor to bring the loan current to qualify for an assumption?
- Would review of a loan application, as opposed to a loss mitigation application, give rise to a private right of action under § 1024.41(a)? We believe such a right of action would be inappropriate because RESPA does not govern loan underwriting procedures, the CFPB has not identified a loan application issue warranting such a measure, and the CFPB lacks statutory authority to create it.
- Would *all* of the § 1024.41 procedures apply to the loan application in addition to the loss mitigation application? These include the 5-day notice about completion; the evaluation timelines; and possibly the right to appeal a denied loan application when assumption is required for a modification. Applying the paper-intensive loss mitigation procedures to loan applications would be overly burdensome to implement in relation to the very small number of successors who assume loans.

If a loan were delinquent on the day a servicer confirms a successor and releases a prior borrower, we are uncertain whether the delinquency would be redefined. The proposed Regulation X definition of delinquency is:

"a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent. A borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow became due and unpaid, until such time as the outstanding payment is made."<sup>35</sup>

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<sup>33</sup> Proposed comment 41(b)-1.

<sup>34</sup> Proposed § 1024.38(b)(1)(vi)(C).

<sup>35</sup> Proposed § 1024.31.

Loans on which there is a confirmed successor may have at least two borrowers. It is therefore unclear what it means for the “borrower” and the loan to be delinquent. We very strongly urge the CFPB not to reset the 120-day clock for preforeclosure reviews if a claimant or successor claims an interest in a property while a loan is delinquent. This would create an incentive for strategic claims of successorship for the purpose of delaying foreclosures.

### 3. *Servicers Are Not Necessarily Originators*

The CFPB may assume that all servicers are equipped to originate loans, but this is not the case. The ability-to-repay regulation may not apply to assumptions, but state law does. State law requires mortgage originators to be registered or licensed. It is not feasible for the CFPB to require every consumer mortgage servicer to be credentialed in every state where the servicer is active, in the event that a borrower of a serviced loan may die or get divorced in any of those states.

Nor is it feasible for the CFPB to require every servicer to be equipped, trained, and staffed to originate mortgage loans. The ability-to-repay rule is but one of the many laws that govern mortgage originations. There are origination disclosure requirements under federal and state law. Servicers who do not originate loans are not capable of producing Loan Estimates, Closing Disclosures, state law origination disclosures, and so on. There are also investor requirements for loan originations that servicers who do not originate loans are not equipped to meet. It is not feasible for every servicer to remain fully staffed to be able to comply with every loan origination requirement except the ability-to-repay rule, in the event that a borrower may die or get divorced.

If the CFPB were to require these servicers to sell the servicing when they confirm a successor, the servicer would not be able to obtain a fair market price because the purchaser would know the servicer is forced to sell quickly.

In its cost-benefit analysis of the proposed successor-in-interest provision, the CFPB does not discuss the costs for servicers to become equipped to originate mortgage loans. In making its determination that this proposed rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, the CFPB states:

“The proposed [successor in interest] provision would not require small servicers to develop new policies and procedures, but rather to continue to apply existing policies and procedures for servicing loans subject to the servicing rules[.]”<sup>36</sup>

In its Paperwork Reduction Act discussion of the successor-in-interest proposal, the CFPB similarly states:

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<sup>36</sup> 79 Fed. Reg. 74176, 74280 (December 15, 2014).

“The Bureau estimates that one-time hourly burden to comply with the proposed disclosure requirements to be four hours and forty minutes, on average, per respondent.”<sup>37</sup>

No servicer can become equipped, staffed, licensed, trained, and ready to begin mortgage loan origination, including ready to make all the origination disclosures required by federal and state law, in less than five hours. The CFPB did not consider the burden on servicers of becoming equipped to originate mortgage loans. We therefore infer that the CFPB did not intend to propose that requirement, but it did not include an exception in the proposed regulation for those servicers.

There are some servicers who would be unable to comply with the proposal without such an exception. These servicers today simply refrain from foreclosing as long as the successor keeps the loan reasonably current. This is similar to a successor who could, but elects not to, assume the loan. The CFPB would need to permit this practice to continue, both for successors currently making payments and for successors who acquire a property in the future.

#### ***4. Continued Mortgage Insurance May be a Condition to an Assumption***

The regulation implementing the Garn-St. Germain Act due-on-sale provision permits lenders to require continued mortgage insurance upon an assumption:

“Paragraph (b) of this section [listing due-on-sale exemptions] does not prohibit a lender from requiring, as a condition to an assumption, continued maintenance of mortgage insurance by the existing borrower’s successor in interest, whether by endorsement of the existing policy or by entrance into a new contract of insurance.”<sup>38</sup>

The implementing regulation tracks the statute.<sup>39</sup> The CFPB’s proposal needs to recognize this safety-and-soundness protection. If the successor does not agree, does not qualify, does not provide relevant application information, or does not pay for the insurance coverage, the servicer is not required to permit an assumption.

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<sup>37</sup> 79 Fed. Reg. 74176, 74283 (December 15, 2014).

<sup>38</sup> 12 C.F.R. § 191.5(c).

<sup>39</sup> 12 C.F.R. § 191.5(c).

E. PRACTICAL PROBLEMS

I. *Refining the Incorporation of § 341(d)*

The CFPB proposes to define a successor in interest as a person to whom an ownership interest in a collateral property is transferred from a prior borrower “provided that the transfer falls under an exemption specified” in § 341(d) of the Garn-St. Germain Act (hereafter “§ 341(d)” or “§ 341” generally). We offer two suggestions.

a. *The Reference Should Include the § 341 Regulations*

We suggest that the incorporation by reference should include the regulation implementing § 341. That regulation prohibits due-on-sale enforcement:

- Only in connection with loans on properties occupied or to be occupied by the borrower.<sup>40</sup>
- In connection with reverse mortgage loans.<sup>41</sup> Preventing due-on-sale enforcement with respect to reverse loans would invite significant fraud and would defeat the purpose of reverse loans.
- Upon creation of a lien pursuant to contract for deed.<sup>42</sup> This is a type of property transfer, and should not be included.
- Upon transfer to an *inter vivos* trust, “if the borrower refuses to provide the lender with reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy.”<sup>43</sup> This is an important safety and soundness protection and fraud prevention.

We note that the CFPB’s proposed regulation does not define the terms “relative,” “spouse,” or “children.” Normally we prefer regulatory clarity, but in this case regulatory consistency is more important. We therefore request that the CFPB *not* define these terms, for fear of a future inconsistent definition in the Comptroller’s (“OCC”) regulation.

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<sup>40</sup> 12 C.F.R. § 191.5(b).

<sup>41</sup> 12 C.F.R. § 191.5(b)(1).

<sup>42</sup> 12 C.F.R. § 191.5(b)(1)(i).

<sup>43</sup> 12 C.F.R. § 191.5(b)(1)(vi).

*b. Some of the Exemptions Are Irrelevant*

We suggest that some of the exemptions in the OCC's regulation not be included in any CFPB regulation, or be included only in part.

Creation of a certain liens. The OCC's list of exemptions include "the creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property" and "the creation of a purchase money security interest for household appliances[.]" Creation of a lien transfers partial ownership interests in a property but does not create a new borrower. There is no reason to invoke successor in interest procedures in these cases.

Granting short-term leases. Another exemption is "the granting of a leasehold interest of three years or less not containing an option to purchase[.]" In this case, the lessee, by definition, does not acquire an ownership interest in the property, and may occupy the property for no longer than three years. There is no reason to invoke successor in interest procedures, and doing so would raise privacy concerns about the lessee's access to the borrower's loan information.

Divorce. There is an exemption for "a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property[.]" In the case of a verified transfer upon divorce, the servicer needs to recognize the change in ownership.

However, the servicer will not release the prior owner from the loan obligation unless the successor meets loan origination underwriting standards, or "credit-qualifies." The total income of the two borrowers by definition is at least as great as the total income of the original borrower or borrowers. Adding an additional successor-borrower to the account without releasing the original borrower should not initiate loss mitigation procedures, unless those procedures would have been appropriate for the original borrower.

Inter vivos trust. Finally, there is an exemption for "a transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property[.]" This is a transfer only in a technical sense, so there is no need to invoke successor in interest procedures.

**2. Borrower's Privacy vs. Successor's Right to Access Information**

Even if a claimant is verified as a valid successor in interest, we are not certain that the successor should always have the right to the complete loan application in all cases. Especially if the successor acquires the property pursuant to a divorce, it is not clear that the successor should have full access to the loan application of the former spouse. Loan

application information normally has no bearing on loan servicing issues, while it contains highly sensitive personal information.

If the successor were treated as a borrower, would the CFPB require servicers to comply with all the claimant's requests for loan application information? If so, this could conflict with Regulation P.

### 3. *Whose Occupancy Status is Relevant?*

If a confirmed successor were treated as a borrower under Regulation X and as a consumer under Regulation Z, questions arise about regulations that distinguish between borrowers who do or do not occupy the collateral property. The proposal does not seem to have fully considered this question.<sup>44</sup> Under regulations that only apply when a loan is secured by the borrower's dwelling or principal dwelling, whose occupancy status is relevant in determining whether the regulation applies, the original borrower's or the successor's?

The Garn-St. Germain due-on-sale protections, by statute, do not depend on occupancy status, but the implementing regulation limits the due-on-sale protection to loans "on the security of a home occupied or to be occupied by the borrower[.]"<sup>45</sup> It is not clear which of these the CFPB proposes to apply.

When occupancy status is relevant, the next question is whose occupancy status, and as of what date. If the property is the principal dwelling of the original borrower but not the successor, is the loan secured by the borrower's principal dwelling? Can an estate have a principal dwelling? Does it matter whether the original borrower or that person's estate is released from the loan obligation? If the property is the principal dwelling of the successor but not the original borrower, is the loan secured by the borrower's principal residence?

If the successor's occupancy status were relevant and the successor occupies the property as a principal dwelling, must that occupancy begin before §§ 1024.39 through 1024.41 apply? Would the servicer or investor be permitted to require a credit report to verify the status, as HAMP requires?<sup>46</sup>

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<sup>44</sup> Proposed Regulation X comment 30(d) would require servicers to review a confirmed successor's loss mitigation application without regard to occupancy status, even though §§ 1024.39 through 1024.41 only apply to a loan secured by a borrower's principal residence. In Regulation Z, proposed § 1026.2(a)(11) would define consumer to include confirmed successors, without regard to occupancy status, for purposes of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41.

<sup>45</sup> 12 C.F.R. § 191.5(b).

<sup>46</sup> HAMP standards provide:

"The servicer must obtain a credit report for each borrower or a joint report for a married couple who are co-borrowers to confirm whether the property securing the mortgage loan is the borrower's principal residence. If the credit report is inconsistent with other information provided by the borrower, the servicer must use good business judgment in reconciling the inconsistency. A servicer must



#### 4. *The CFPB Should Not Require Duplicate Disclosures*

Under both Regulations X and Z, if both the original borrower and the successor are borrowers or consumers, duplicate disclosures should not be required, just as they are not when there are multiple borrowers or consumers on one loan. The CFPB discusses the possibility that both would be borrowers or consumers simultaneously:

“It is quite common for more than one consumer (for example, spouses) to be obligated on the mortgage note, and the Mortgage Servicing Rules apply with respect to each consumer in such cases. Accordingly, the Bureau does not believe that applying Regulation Z’s mortgage servicing rules to successors in interest presents novel challenges for servicers in this regard.”<sup>47</sup>

This statement is true only if the servicer is not required to send one disclosure to two addresses. Duplicate disclosures would present a novel challenge without a consumer benefit.

- No Successor. Disclosures must go only to the original borrower (or that person’s estate) before a successor is confirmed because sending protected loan information to an unconfirmed claimant would be a privacy breach.
- Borrower Released. When a successor is confirmed and the original borrower or the estate is released from the loan, future disclosures should go to the successor. Sending future loan information to the released borrower would be a privacy breach. The released borrower may still request information and error resolutions, related to the loan before release, for a year under §§ 1024.35 and 1024.36
- Borrower and Successor. If a successor is confirmed but the prior borrower is not released, the original borrower, successor, and servicer should decide who receives the disclosures. Usually, they are given to the party who is making the loan payments, but that may not be ideal in all cases.

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consider a mortgage loan for HAMP that, while originally secured by non-owner occupied property, has become the borrower’s principal residence as long as such occupancy can be verified.” *Handbook for Servicers of Non-GSE Mortgages*. Ch. II § 5.3, v. 4.4 (March 3, 2014).

<sup>47</sup> 79 Fed. Reg. 74176, 74236 (December 15, 2014).

F. POSSIBLE ADDITION TO THE LIST OF PROTECTED OWNERS

The CFPB does not propose adding new categories of protected owners, but asks whether:

“the Mortgage Servicing Rules should expressly and specifically address the status of persons who possess an ownership interest in the property, have not have [sic] assumed the mortgage loan obligation (*i.e.*, legal liability for the mortgage debt) under State law, but did not acquire an ownership interest from a prior borrower on the mortgage loan. Such persons would include, for example, persons who purchased the property jointly with the prior borrower but did not undertake the mortgage loan obligation when the loan was originated and may not necessarily have assumed the mortgage loan obligation thereafter. The Bureau is considering, but is not proposing at this time, expressly providing that such persons are borrowers for the purposes of the Mortgage Servicing Rules. The Bureau solicits comment on whether this category of persons are having difficulty with their treatment by mortgage servicers, and if so, the extent and nature of the difficulty.”<sup>48</sup>

It is unclear what the CFPB has in mind.

The servicer will not release the original borrower unless the successor credit-qualifies. There is no need for additional loss mitigation upon divorce if the prior borrower remains obligated on the debt.

The CFPB may have in mind a transfer to a spouse, who already was a co-owner, as a result of death. The Garn-St. Germain Act protects from due-on-sale enforcement transfers by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety.<sup>49</sup> The joint tenant or tenant by the entirety would have had a partial ownership interest before the transferor’s death, so there was no need to include language in Garn-St. Germain that the transfer result in the survivor becoming an owner. The servicer will not release the estate from the loan obligation unless the surviving spouse credit-qualifies. Otherwise, servicers will pursue loss mitigation but will look to the resources of the estate as well as of the survivor. There is no reason for a regulation to require this because the estate remains a borrower, and is therefore potentially eligible for loss mitigation.

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<sup>48</sup> 79 Fed. Reg. 74176, 74190 (December 15, 2014).

<sup>49</sup> Garn-St. Germain Act § 341(d)(3).

G. QUESTIONABLE STATUTORY AUTHORITY

The CFPB proposes to treat successors as borrowers under RESPA and as consumers under TILA even if the successors do not sign a promissory note and do not apply for a loan. The CFPB proposes to restrict enforcement of contractual delinquency remedies in cases where Congress enacted a law protecting those remedies, and may propose to require assumptions. We have the following concerns about the CFPB’s statutory authority for the successors in interest aspect of its rulemaking.

1. ***RESPA Requires a Borrower on a Federally-Related Mortgage Loan***

RESPA governs federally-related mortgage loans.<sup>50</sup> The proposal would apply RESPA to a person who is not a party to a federally-related mortgage loan. RESPA defines servicing as “receiving any scheduled periodic payments from a borrower pursuant to any terms of any loan. . . .”<sup>51</sup> It is not clear that RESPA applies to servicers unless the servicer receives “payments from a borrower” who signed a federally-regulated mortgage loan. It is not clear that interstate commerce is involved such that Congress has authority to regulate in the absence of a borrower on a federally-related mortgage loan, because the successor acquires the property solely under state law.

The CFPB describes its successors in interest proposal as an appropriate response to “significant problems related to RESPA’s purposes[.]”<sup>52</sup> In citing RESPA’s purposes, the CFPB points only to its regulation. Congress, not a regulation, defines the purposes of federal statutes, and Congress enumerated several RESPA purposes.<sup>53</sup> None of RESPA’s purposes relate to servicing, to property succession, to the Garn-St. Germain Act, to loan assumptions, to loss mitigation, or to foreclosure.

Additionally, the proposal would require loss mitigation for successors under RESPA authority, but RESPA does not “affect the validity or enforcement of any . . . loan agreement, mortgage, or lien made or arising in connection with a federally-related mortgage loan.”<sup>54</sup>

It is not clear that Regulation X can regulate a servicer’s actions with respect to a successor who owns a property on which the mortgage debt is unpaid, but who is not a borrower. It is also not clear that RESPA can restrict use of state law contractual default remedies.

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<sup>50</sup> RESPA § 2(b) and § 3.

<sup>51</sup> RESPA § 6(i)(3).

<sup>52</sup> 79 Fed. Reg. 74176, 74182 (December 15, 2014).

<sup>53</sup> RESPA § 2(b).

<sup>54</sup> RESPA § 17.

## 2. *TILA Generally Does Not Apply to Servicers*

TILA governs creditors and credit transactions generally, and it is not clear that it can apply to those who do not borrow. Further, TILA generally does not apply to servicers. TILA defines a creditor as a person who “regularly extends” consumer credit and to whom the debt is initially payable.<sup>55</sup> Not all mortgage servicers are mortgage creditors under this definition. TILA generally does not reach mortgage servicers unless they are also the creditor.<sup>56</sup> TILA generally does not apply to servicers who service loans they do not own.

Further, TILA and Regulation Z, with irrelevant exceptions, “do not affect the validity or enforceability of any contract or obligation under State or Federal law.”<sup>57</sup> It is not at all clear that TILA can affect use of contractual default remedies under state law.

## 3. *Garn-St. Germain Restricts Modifications and Permits Foreclosures*

The CFPB states:

“The Garn-St Germain Act, like the Bureau’s proposed amendments to the Mortgage Servicing Rules, protects successors in interest from foreclosure after transfer of homeownership to them.”<sup>58</sup>

The CFPB defers to the Garn-St. Germain Act “policy choice about which categories of successors in interest should be protected from foreclosure.”<sup>59</sup>

We are compelled to point out that the Garn-St. Germain due-on-sale provision to which the CFPB defers was not designed to protect against any consequences of delinquency. It was designed to address an issue that can only arise when the individual who might assume the loan is capable of paying *well more* than the current loan payments. In this situation, the Garn-St. Germain Act may prohibit loan *modification*. It never restricts foreclosure based on delinquency.

Congress passed the Garn-St. Germain Act during a period of both very high interest rates and heavy losses at depository institutions. At that time, depository institutions, especially savings and loan associations, made fixed-rate mortgage loans, and often held

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<sup>55</sup> TILA § 103(g)(1).

<sup>56</sup> TILA § 131(e) broadly limits mortgage assignee liability. Section 131(f) provides that “[a] servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is or was the owner of the obligation.”

<sup>57</sup> TILA § 111(d).

<sup>58</sup> 79 Fed. Reg. 74176, 74185 (December 15, 2014).

<sup>59</sup> 79 Fed. Reg. 74176, 74181, referring to Garn-St. Germain § 341(d), which exempts certain transfers from enforcement of due-on-sale clauses.

the loans they made in portfolio. A major source of funding for depository institutions is short-term deposits, and Congress had recently eased rate caps on deposits.<sup>60</sup> The increase in market interest rates increased depositories' cost of funds but was not offset by increased income on long-term fixed-rate loans.<sup>61</sup> The Garn-St. Germain Act revised regulation of depository institutions to address this "rate squeeze" and to improve the safety and soundness of the nation's depository institutions and of the deposit insurance funds.

The due-on-sale provision was a response to a competitive dispute about a Federal Home Loan Bank Board ("FHLBB") regulation that preempted state law restrictions on due-on-sale clauses for federal savings and loan associations. Lenders holding loans with below-current interest rates benefit from immediate repayment of the loans because they can replace the loans with new loans at a market rate. Property purchasers prefer to assume loans with below-market rates rather than take out new loans at the higher market rate.

Due to the high interest rates of the time, some mortgage lenders were giving property purchasers a choice – either agree to pay a market (higher) rate on the loan when assuming it, or the lender would enforce the due-on-sale clause. That is, the due-on-sale clause became a tool by which lenders could require a loan modification to increase the interest rate when a new borrower assumed the loan. This was *not* a foreclosure issue because if the assuming borrower could not credit-qualify for the loan with an increased rate, the lender would not make the offer, and would enforce the due on sale clause. That is, the § 341 protection from due-on-sale enforcement only applies when the new borrower can repay the loan with higher payments, does not face foreclosure, and wants to retain both the property and the loan.

The Supreme Court had upheld the FHLBB's due-on-sale preemption regulation.<sup>62</sup> Lenders that were not federal savings and loan associations were competitively disadvantaged by the FHLBB preemption regulation. Congress heard their complaints and was aware of the Supreme Court's decision.<sup>63</sup> Congress could have amended the federal statute on which the FHLBB preemption was based, but elected not to. Instead, in the Garn-St. Germain Act, Congress broadened the preemption to provide all mortgage

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<sup>60</sup> Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-211, 94 Stat. 132.

<sup>61</sup> "The intervening two-year period [after Congress began lifting caps on deposit interest rates] has been one of unprecedented high interest rates that have caused havoc to depository institutions due to the inability of their assets to produce profitable earnings. This problem has acutely affected the thrift institutions." S. Rep. 97-536, at 5 (1982), accompanying the Garn-St. Germain Act.

<sup>62</sup> *Fidelity Federal Savings & Loan Association. v. De la Cuesta*, 458 U.S. 141 (1982) (upholding preemption and rejecting the so-called *Wellenkamp* doctrine that due-on-sale enforcement is prohibited absent a lender's need to protect against impairment to its security or against the risk of default.) See *Wellenkamp v. Bank of America*, 582 P. 2d 970 (Cal. 1978).

<sup>63</sup> "Finally, the recent Supreme Court decision in *Fidelity Federal Savings and Loan Association v. De La Cuesta*, upholding the right of federal savings and loan associations to enforce due-on-sale clauses, significantly disadvantaged state chartered and other lenders[.]" S. Rep. 97-536 at 21 (1982).

lenders, regardless of charter type, with the same ability to require new borrowers to accept an increased rate,<sup>64</sup> with exceptions in § 341(d). That is, § 341 is designed to address when lenders may and may not require a loan modification.

Section 341 restricts modifications in connection with certain transfers, those enumerated in § 341(d). These § 341(d) transfers are exceptions to the lender's ability to require a loan modification to increase the interest rate. They are not exceptions to the lender's ability to foreclose or to exercise any remedy based on inability to repay the loan. Congress chose a policy of letting these § 341(d) successors keep the loan unmodified as long as they can repay the loan. This is why the statute did not prohibit, or even restrict, foreclosures based on inability to repay.

The § 341(d) exceptions prohibit loan modifications that increase loan payments after § 341(d) transfers. For the CFPB to require loan modifications or reduced loan payments in those circumstances cannot be based on the Congressional policy behind, or the language of, the Garn-St. Germain Act.

#### **4. *Garn-St. Germain Is Explicit that it Does Not Affect Delinquency Remedies***

Not only does the policy behind § 341 not support the CFPB's successor in interest proposal to delay foreclosure, the statute itself explicitly prohibits this proposal. Section 341(b) explicitly permits lenders to exercise their contractual rights according to the contractual terms, with exceptions only for due-on-sale clauses in some cases:

**“Except as otherwise provided in subsection (d), the exercise by the lender of its option pursuant to such a [due-on-sale] clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract.”**

The OCC's implementing regulation has nearly identical language.<sup>65</sup> The statute and regulation mean that exceptions to enforcement of a due-on-sale clause are limited to the § 341(d) exceptions, and that all other “rights and remedies” are “fixed and governed” only by the contractual terms. If the CFPB will require a treatment of a lender's contractual rights other than according to the contractual language, it must find its authority in § 341(d), which does not affect delinquency remedies.

The CFPB cannot write a regulation under § 341(d) because the Garn-St. Germain Act is not among the laws the CFPB administers. The Garn-St-Germain Act specifies which agencies write its due-on-sale regulations, and they are “Federal Home Loan Bank Board, in consultation with the Comptroller of the Currency and the National Credit Union

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<sup>64</sup> Garn-St. Germain § 341(b)(2).

<sup>65</sup> 12 C.F.R. § 191.3(b) (federal thrifts) and § 191.4(b) (other lenders).

Administration Board.”<sup>66</sup> The Dodd-Frank Act authorized the CFPB to administer only enumerated laws,<sup>67</sup> and § 341 is not among them.

Even if the CFPB had authority to write § 341 regulations, it would not have the authority to write a regulation that conflicts with § 341 itself. Section 341(d) prohibits loan modifications in some circumstances, and explicitly protects all contract terms otherwise. The CFPB proposes to prohibit servicers from exercising their contractual rights in the same circumstances where Congress protected those very contractual remedies. Congress expressly protected the lender’s right to require full repayment of the loan, and the lender’s remedy of foreclosure in the event of nonpayment.

If Congress had enacted different statutory language, there might be an argument that § 341 permits regulations that require lenders to refrain from requiring borrowers to repay their loans according to the agreement. For example, there might be such an argument had Congress enacted the following language:

“Except as otherwise provided in subsection (d), the exercise by the lender of its option pursuant to such a [due-on-sale] clause **but not the exercise of its remedies in the event of default** shall be exclusively governed by the terms of the loan contract, ~~and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract.~~”

Congress chose a very different policy from this doctored language. Congress provided that the subsection (d) exceptions are exceptions only to the due-on-sale contractual language. In addition, by including the language struck through above, Congress was clear that all contract provisions other than the due-on-sale clause are fully enforceable according to their terms. These include all remedies in the event of delinquency. Congress was explicit that lenders can require all successors to repay the loan according to its contractual terms.

The CFPB’s proposal to adopt a regulation that contradicts the Garn-St. Germain Act policy, while the Garn-St. Germain Act is not a law that the CFPB administers, that contradicts the Garn-St. Germain Act itself and OCC’s regulation, and that would

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<sup>66</sup> Garn-St. Germain Act § 341(e). When it abolished the FHLBB, Congress provided that its regulations, unrelated to the agency’s deposit insurance functions, would continue in effect uninterrupted as regulations of the Office of Thrift Supervision (“OTS”). Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 401(h), 103 Stat. 183, 357, 12 U.S.C. § 1437 (note).

When it abolished OTS, Congress provided that OTS regulations would continue in effect uninterrupted, as regulations of one of three agencies, to be identified by the agencies in a *Federal Register* notice. Dodd-Frank Act § 316(b) and (c), 12 U.S.C. § 514. The OCC published a list of the OTS regulations to which it succeeded, including the OTS due-on-sale preemption regulation, which was at that time at in 12 C.F.R. Part 590. 76 Fed. Reg. 39246, 39247 (July 6, 2011). The OCC therefore administers and enforces the Garn-St Germain due-on-sale regulation.

<sup>67</sup> See, e.g., Dodd-Frank Act § 1021, 12 U.S.C. § 5511.

override a statutory safety and soundness protection although the CFPB is not a safety and soundness regulator, is questionable.

Servicers usually benefit from providing loss mitigation to borrowers and to successors who cannot fully repay a loan. Today, servicers do so, and they will continue to do so, consistent with protecting against potential fraud or inappropriate claims. Nevertheless, this needs to remain voluntary.

### 5. *Preemption Is Unavailable*

Loan contracts and mortgages, and the enforceability of both, are governed by state law. The CFPB cannot preempt these laws. The CFPB does have some authority to preempt state law, but not contract law, real property law, or mortgage foreclosure law. Federal law does not preempt conflicting state law, in areas traditionally regulated by the states, absent “clear and manifest” Congressional intent to preempt.<sup>68</sup> Real property law, including mortgage foreclosures, have historically been regulated by the states. The Supreme Court has held that title to real estate is inherently a matter for state law,<sup>69</sup> as are property interests, including security interests in land.<sup>70</sup>

The CFPB’s RESPA preemption authority is limited to settlement practices, which do not include servicing laws or foreclosure laws. The CFPB does not have authority to interfere with state laws that govern the default remedies in contracts governed by state law in connection with state real property and mortgage law. There is nothing in the Dodd-Frank Act, RESPA, or TILA indicating the slightest Congressional intent to preempt state contract, real property, or foreclosure laws.

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<sup>68</sup> *Cipollone v. Liggett Group*, 505 U.S. 504, 517 (1992) (“Consideration of issues arising under the Supremacy Clause ‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.’”). *See also California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (courts “must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States. When Congress legislates in a field traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”) (citations omitted); *California v. FERC*, 495 U.S. 490 (1990) (similarly holding that there is a presumption against preemption of state law in areas traditionally regulated by the States absent a clear and manifest purpose of Congress to overcome the presumption.)

<sup>69</sup> In a case contesting whether the amount of a debt satisfied by a foreclosure on a home under state law was “reasonably equivalent” to the property value, to determine whether there was a fraudulent transfer under bankruptcy law, the Supreme Court held, “It is beyond question that an essential state interest is at issue here: We have said that ‘the general welfare of society is involved in the security of the titles to real estate’ and the power to ensure that security ‘inheres in the very nature of [state] government.’” *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994) (citation omitted).

<sup>70</sup> In a case concerning whether a mortgagee has the right to rents on a property after a mortgagor’s bankruptcy and before a foreclosure, the Supreme Court held “Property interests are created and defined by state law. . . . The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property.” *Butner v. U.S. et al.*, 440 U.S. 48 (1979).



Regardless of the policy reasons for the proposed successors in interest regulation, we are concerned that creating a new federal regulation with such uncertain legal authority would risk resulting in the regulation being overturned. Servicers are concerned about the prospect of being required to implement a comprehensive regulatory procedure that may be overruled or, perhaps worse, that may be overruled in different ways in different jurisdictions.

#### H. RECOMMENDATIONS

The proposed regulation on successors in interest is not developed sufficiently to be finalized. We believe the CFPB should set this aspect of the present rulemaking aside and learn more about the causes of the difficulties successors in interest face. It is not apparent that any federal rulemaking can alleviate these difficulties.

We strongly suggest the CFPB consult with authorities, including the President's Financial Fraud Enforcement Task Force, Federal Bureau of Investigation, and SIGTARP, to learn about the many types and methods of mortgage fraud, and with FinCEN to learn about the various money-laundering schemes. The CFPB needs substantially more input about property succession issues before it proceeds with any successors in interest rulemaking or even guidance. At a minimum, the CFPB should convene a roundtable of experts to flesh out the causes of difficulties in real property succession, the need for consumer education about how to prevent these difficulties, and the risks that servicers must manage when property ownership is claimed to have been transferred.

## II. The FDCPA SHOULD NOT APPLY to MORTGAGE LOANS

We are aware that the CFPB has a broad debt collection rulemaking underway, covering but not limited to mortgage debt. Nevertheless, we discuss here FDCPA issues that confront mortgage servicers and that risk harm to consumers, and that only Congress or the CFPB can address.

The present rulemaking would impose new requirements on mortgage servicers that vary depending on whether a consumer sends a servicer an effective FDCPA cease-communication notice. A cease-communication notice is effective only if the FDCPA applies, but no one knows whether it does, not even the CFPB. This rulemaking, then, proposes to effectively require servicers to know when the FDCPA applies. This rulemaking, therefore, squarely presents all issues relating to the FDCPA's applicability to mortgage debt.

Valid cease-communication notices create conflicts between the FDCPA and the many laws that require servicers to send communications to consumers. A recent example is the Regulation Z requirement for servicers to send interest rate reset notices<sup>71</sup> even if a consumer sent a cease-communication notice. The CFPB has had difficulty deciding which law should prevail, and merely “encourages” servicers to comply with Regulation Z when it conflicts with the FDCPA.<sup>72</sup>

The FDCPA requires debt collectors to notify consumers of certain debt validation rights that are much narrower than debt validation rights under federal mortgage laws. FDCPA debt validation notices would be misleading and inaccurate because they would tell consumers that they have limited rights to dispute their debt, when in fact they have rather broad rights to do so. The FDCPA debt validation requirements conflict with, and offer less protection than, mortgage servicing laws.

This letter seeks to provide the CFPB with the background it needs to end the conflicts of law that the FDCPA creates, and to do so in a manner that protects consumers.

We describe below the harm that debt validation and cease-communication notices can create. We describe why it is difficult to know whether the FDCPA applies to mortgage debt; how the statute contradicts a statement in a Senate report accompanying the legislation; how the FDCPA's applicability is based on facts unrelated to mortgage borrowers; and how the FDCPA's applicability would result in differing treatment of equally situated consumers. We explore the FDCPA's legislative history to demonstrate

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<sup>71</sup> 12 C.F.R. § 1026.20(c).

<sup>72</sup> “The Bureau is not, however, making a determination as to the legal status of the requirements under § 1026.20(c) [rate-reset notices] following receipt of proper cease communication requests at this time. As noted in the IFR, the Bureau continues to **encourage** servicers to provide ARM payment adjustment notices to the extent that the FDCPA permits.” 79. Fed. Reg. 74176, 74209 n. 131 (December 15, 2014) (emphasis added).

that Congress intended the law to have a very narrow scope, and that Congress never envisioned applying the law to performing loans. We detail how all the consumer protections for mortgage debt in the FDCPA are supplanted by more modern laws, so that there would be no disadvantage to consumers by removing FDCPA applicability from mortgage debt. This review will demonstrate:

- The FDCPA applies to a narrow category of debt collectors, and does not apply to a much broader category of creditors.
- Servicers are more similar to creditors than to debt collectors.
- Congress distinguished debt collectors from creditors because Congress heard testimony that debt collectors, but not creditors, used unfair debt collection practices.
- Congress found that debt collectors, but not creditors, had incentives to use unfair debt collection practices, derived from several differences between debt collectors and creditors:
  - Debt collectors are called in after creditors attempt, unsuccessfully, to collect a debt. That is, by the time a debt gets to a debt collector, it has become a difficult collection case.
  - Debt collectors are compensated more lucratively than creditors.
  - Debt collectors do not maintain an ongoing relationship with consumers, while creditors do.
- Congress found that the combination of difficult debts, lucrative compensation contingent on collection success, and no need to maintain ongoing consumer relationships, combined to create incentives for debt collectors to resort to practices that Congress found – and we agree – are inappropriate and should be illegal.
- The FDCPA debt validation procedure results from a policy decision Congress made to resolve a question that does not arise with respect to mortgage loans. The question is how much a debt collector should know about a loan before the collector may contact a consumer. Servicers are required to have virtually all account information at all times, so the validation question does not arise for mortgage servicers.
- The cease-communication right has no benefit to mortgage borrowers, and can be quite harmful to them.

Application of the FDCPA to mortgage loans would stand in sharp contrast to the mortgage provisions in the Dodd-Frank Act and in the CFPB's mortgage servicing regulations. The Dodd-Frank Act and CFPB regulations were designed to ensure that consumers are aware of their loans and their rights, from before closing and throughout the life of the loan, whether consumers request information or not. A cease-communication requirement would be contrary to the purposes of the several federal and state loss mitigation programs, including those of the Treasury Department, Federal Housing Administration, and Veterans Administration. A debt validation notice would tell consumers they have narrower rights than they have under the information request and

error assertion rights in Regulation X, and the Regulation Z right to continuing notice through periodic statements.

With this background, we encourage the CFPB to affirmatively exercise its FDCPA authority to make clear that the FDCPA does not apply to mortgage debt, or, barring that, that mortgage servicers are not required to go through FDCPA debt validation procedures or to honor cease-communication notices, regardless of whether the FDCPA applies.

A. THE FDCPA CAN HARM MORTGAGE BORROWERS

Once a debt collector receives a cease-communication notice from a consumer, the debt collector “shall not communicate further with the consumer with respect to the debt” except for extremely narrow purposes. These exceptions are limited to notice that the debt collector will terminate its collection activities, notice that the debt collector or creditor “may invoke specified remedies which are ordinarily invoked by such debt collector or creditor[,]” and notice that the debt collector or creditor intends to invoke that remedy.<sup>73</sup> For mortgage loans, the “specified remedy” is foreclosure.

That is, if cease-communication notices were binding on mortgage servicers, the servicer would be prohibited from almost all communications to the consumer. The FDCPA permits no exception for communication that a consumer requests, unless the consumer revokes the cease-communication notice in its entirety. The FDCPA does not create or recognize a right to partial, conditional, or selective cease-communication notices.

Terminating virtually all communication to consumers regarding a mortgage loan would be extremely harmful. Mortgage loans are quite dynamic, and consumers need continuing information about them. Mortgage loans can have interest rate adjustments, step payment adjustments, and escrow payment adjustments. Loans that have no escrow still require payment of property taxes and insurance premiums, and if not paid, the servicer will pay them and the consumer will owe the servicer the cost. Prepayment penalties and mortgage insurance may sunset. Servicer information may change as well, such as the servicers’ address for sending payments. It is not reasonable to believe that Congress intended consumers to be left in the dark about performing loans.

A debt validation procedure has no purpose as to mortgage servicers because servicers are required to have all information, and to correct errors, at all times, not merely before foreclosing. A debt validation notice for the unwary would be misleading, and for the astute would be just one more useless piece of paper to throw away. Consumers cannot and should not rely on it.

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<sup>73</sup> FDCPA § 805(c), 15 U.S.C. § 1692c(c).

B. THE FDCPA IS INCONSISTENT CONCERNING MORTGAGE DEBT

The FDCPA applies to debt collectors but not to creditors. Generally, a creditor is a party to whom debts are owed, while a debt collector is a party collecting debts owed to another.

1. *Is a Transfer of Debt or of Servicing Determinative?*

According to the statute, a creditor does not include a party who receives an assignment or transfer of a “debt in default” solely to facilitate collection for another.<sup>74</sup> Also under the statute, a debt collector does not include a party collecting a “debt which was not in default” when the debt collector “obtained” it.<sup>75</sup> That is, the relevant fact under the statute is whether the debt was in default when the *debt* was transferred. A Senate report explains that the intent was to look at whether the debt was in default when the *servicing* was transferred:

“[T]he committee does not intend the definition [of debt collector] to cover . . . the collection of debts, such as mortgages and student loans, by persons who originated such loans; mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing . . . .”<sup>76</sup>

The statute contradicts the Senate report. That is, when the FDCPA applies to mortgage debt is unclear.

2. *Mortgage Loan and Servicing Transfers Are Irrelevant to Debt Collection*

Neither the statute nor the Senate report would make much sense if the FDCPA applies to mortgage debt. Mortgage loans and mortgage servicing may transfer for any number of business reasons that are invisible to consumers and that have no effect on them. The GSEs, for example, are in the process of divesting most of their mortgage portfolios because their conservator required them to do so. These portfolio divestitures have nothing to do with whether a loan was in default at time of transfer, and have nothing to do with debt collection, the FDCPA, or consumer protection. The divestitures relate to the safety and soundness of the GSEs.

Additionally, banking regulators have amended capital requirements for servicing rights. Capital requirements vary by servicers’ charter type, so the cost of servicing varies by charter type. Amended capital requirements can prompt servicing transfers. Servicing

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<sup>74</sup> FDCPA § 803(4), 15 U.S.C. § 1692a(4).

<sup>75</sup> FDCPA § 803(6)(F)(iii), 15 U.S.C. § 1692a(6)(F)(iii).

<sup>76</sup> S. Rep. 95-382 1997 U.S.C.C.A.N. 1695, 1698, 1997 WL 16047.

transfers due to capital requirements have nothing to do with whether a loan was in default at time of transfer, and have nothing to do with debt collection, the FDCPA, or consumer protection. Capital requirements are designed to protect the safety and soundness of financial institutions.

Mortgage loans and mortgage servicing are not transferred solely for collection purposes. Mortgage servicers perform many of the same functions on both performing and nonperforming loans.

The factual basis for application of the FDCPA to mortgage debt, assuming Congress finished choosing one, is unrelated to the purposes of the FDCPA.

### ***3. Equal Consumers, Different Results?***

Regardless of whether a transfer of a loan or of servicing is relevant to the FDCPA's applicability, its applicability to mortgage borrowers would be inconsistent for no apparent reason. If the servicer services a loan it originated, and the servicing to which it never transferred, the FDCPA would not apply. If the same servicer also services a loan that was transferred (or the perhaps servicing was transferred) while the loan was in default, the FDCPA would apply. That is, the FDCPA would apparently apply to some mortgage borrowers but not others, although the consumers are equally situated, based on the happenstance of the timing of a loan or servicing transfer that has no affect whatsoever on the debt or on debt collection. The two equally-situated consumers would receive different information, with one receiving full information and the other receiving misleading or incomplete information.

It is difficult to believe Congress envisioned such differing treatment for equally situated consumers. Nothing in the legislative history supports any such distinction.

### C. LEGISLATIVE HISTORY OF THE FDCPA

The legislative history of the FDCPA demonstrates that Congress designed the law to protect consumers from abusive debt collection practices by debt collectors and not creditors.

#### 1. *The FDCPA Is Designed to Prohibit Unfair Debt Collection Practices*

Congress enacted the FDCPA in reaction to unfair debt collection practices.

“Mr. Speaker, debt collectors have a very effective way of collecting debts. It is called ‘beating’ and it consists of the repeated calling of an individual, sometimes into the night, until he or she finally agrees to pay. . . . Although beating is usually reserved for the ‘hard core’ cases, Mr. Clark had several other methods which he used ‘to get behind’ a consumer. In certain cases he would don a police uniform, show up at a person’s home and threaten immediate arrest unless the debt was paid. At other times, Clark told the subcommittee he bribed attorneys for the use of their names and letterhead, threatened the children of consumers, told lies to the family and friends of difficult ‘clients,’ and shouted abusive or even sexual insults over the phone. According to Clark, even local judges and police officials were taking some of the 50 percent he would make on every collection in return for their services in helping Clark make his threats look official.”<sup>77</sup>

“Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a consumer’s personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.”<sup>78</sup>

The FDCPA has only the single purpose of prohibiting unfair debt collection practices. It has no application to performing loans, even if the loans had been delinquent earlier.

#### 2. *Congress Distinguished Creditors from Debt Collectors*

Congress heard testimony about unfair debt collection practices by independent debt collection firms. Congress found the differences between the practices of debt collectors and creditors resulted from differing incentives. Debt collectors are called in to handle difficult debts, and are paid more than creditors for successful collections.

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<sup>77</sup> 122 Cong. Reg. 21741 (June 30, 1976) (statement of Rep. Annunzio, a major architect of the FDCPA).

<sup>78</sup> S. Rep. 95-382 1997 U.S.C.C.A.N. 1695, 1696, 1997 WL 16047.

“In an earlier statement I indicated the scope of this legislation would include all creditors. As introduced, the act applies just to debt collectors. I feel that the most flagrant offenders in debt collecting abuses are debt collectors rather than creditors. Debt collectors are in the business solely to collect debts of others, not to collect for products they sold or services they rendered.”<sup>79</sup>

“I think it is quite clear that this bill will only affect collection practices by a company whose principal business is the collection of debts. Companies that have their own in-house collection practices have an added incentive not to harass their customers. They have a vested interest in helping their customers pay their bills in a manner that is courteous, without using intimidating techniques. The person who is a debtor today may be a paying customer tomorrow. That is why this bill relates solely to debt collection agencies, not to those that have their own in-house method of debt collection. No witnesses testified before our committee complaining about debt collection practices by in-house collectors.”<sup>80</sup>

“Debt collectors do not really compete with creditors because creditors first attempt to collect their own 30-day overdue accounts while debt collectors usually work on accounts that are at least 60 to 90 days overdue. Accounts are generally turned over to collection agencies only after a creditor has tried and been ineffective in collecting on his own. Therefore, these accounts are likely to be difficult to collect and may create an attempt to use harsh collection tactics.”<sup>81</sup>

“Debt collectors do not actually compete with creditors because creditors first attempt to collect their own 30-day overdue accounts. On the other hand, according to industry testimony, debt collectors usually work on accounts that are at least 6 months overdue. Accounts are generally turned over to collection agencies only after a creditor has tried and been unsuccessful in collecting on his own. Therefore, these accounts are usually difficult to collect and are more likely to result in the use of harsh collection tactics.”<sup>82</sup>

“Mr. Speaker, I am going to speak to this, because there is a good reason for this practice. The reason the debt-collection agency is more apt and willing and ready to sue [use?] under these practices which the gentleman referred to than is the selling company is quite clear. The selling company, whether it is a record company or any of these other companies, turns the matter over to the debt collector because it does not want to be in the position of harassing customers and getting a name for so doing. Here is where the distinction comes in. They say,

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<sup>79</sup> 121 Cong. Rec. 32960 (October 9, 1975) (statement of Rep. Annunzio).

<sup>80</sup> 123 Cong. Rec. 10248 (April 4, 1977) (statement of Rep. Evans).

<sup>81</sup> 122 Cong. Rec. 22499 (July 19, 1976) (Statement of Rep. Annunzio).

<sup>82</sup> 123 Cong. Rec. 10242 (April 4, 1977) (statement of Rep. Annunzio).



‘Regretfully, we have turned your account over to such-and-such an agency, since you have not paid.’<sup>83</sup>

“Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.”<sup>84</sup>

Servicers receive a few basis points from loan payments, not half of the loan amount collected, as Congress found debt collectors collect. Servicers do not have the incentives debt collectors have.

Further, Congress distinguished between debt collectors and creditors based on the different relationships they have with consumers. Debt collectors have no contact with the consumer after the debt collection is over, while creditors have a continuing relationship, and possibly other future business, with the consumer.

“Independent debt collectors represent a separate industry from creditors. Debt collectors’ primary business is the collection of debts. Unlike creditors, they do not offer to sell any product or service to consumers.”<sup>85</sup>

“[C]ollection agencies across the country, each averag[e] 8 employees. . . Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them.”<sup>86</sup>

“Like the House bill, this legislation deals exclusively with the independent, third-party debt collection agency, and does not directly regulate the practices of the creditor who originates the debt or who undertakes his own collection efforts. This distinction is both understandable and appropriate. The independent collectors, by common practice, are recognized as a separate industry. They have no particular concern for maintaining good customer relations with the debtors they pursue. And, above all, the independent collectors generate a disproportionate number of the complaints about collection practices. Mr. President, it is critical that the American public understand the purpose and need for this legislation. The House hearings, and my own investigation, have

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<sup>83</sup> 122 Cong. Rec. 22502 (July 19, 1976) (statement of Rep. Fenwick).

<sup>84</sup> 123 Cong. Rec. 27387 (August 5, 1977) (statement of Sen. Riegle).

<sup>85</sup> 122 Cong. Rec. 22499 (July 19, 1976) (statement of Rep. Annunzio). “And, in this case, there are good reasons for limiting the scope of the legislation to independent debt collectors. . . . Independent debt collectors compose an industry separate from creditors. Debt collectors’ business is the collection of debts. Unlike creditors, they do not sell any product or service to consumers.” 123 Cong. Rec. 10242 (April 4, 1977) (statement of Rep. Annunzio).

<sup>86</sup> 123 Cong. Rec. 27386-87 (August 5, 1977) (statement of Sen. Riegle).

documented some intolerable collection practices engaged in by third-party debt collectors[.]”<sup>87</sup>

“It does exclude the inhouse collector, that is true. The bill excludes in-house collection activity. It does not apply to business credit, in other words. It is only after a debt is turned over to an independent collection agency that the bill would come into play.”<sup>88</sup>

“Mr. DEVINE. I see here it says it applies only to professional debt collection agencies and does not apply to anyone attempting to collect debts on behalf of a company who employs them. Why that double standard?

Mr. WYLIE. Because the in-house debt collector is in the business of doing something other than debt collecting. They are principally in the business of selling a product, like Sears, J. C. Penney’s, or Lazarus. They want to maintain good public relations. They are not as likely to be as aggressive in the collection of debts as independent debt collectors.”<sup>89</sup>

Mortgage loans are long-term loans, and defaults are commonly cured, with or without loss mitigation. Servicers usually maintain a relationship with each customer for many years. Debt collectors, on the other hand, are called in when there is not much hope of a cure, and do not have long-term relationships with debtors.

The differences Congress found between debt collectors and creditors prompted Congress to distinguish between them in the FDCPA. While the statute does not mention servicers, servicers function more like creditors than like debt collectors.

- Servicers are not called in only after a mortgage loan has proven difficult to collect as debt collectors are; rather, servicers are in place before a loan is originated and stay in place continuously thereafter.
- Congress distinguished debt collectors as motivated by incentive to “collect by any means.” Servicers do not have such a desperation incentive.
- Debt collectors are involved only with hard-to-collect cases, and only until they liquidate or give up on a debt; servicers are involved while a loan is performing, and through delinquencies and cures. The FDCPA did not mean to apply to performing loans because unfair debt collection practices, or fair debt collection practices, do not exist with respect to current loans.
- Debt collectors do not cross-sell to consumers because doing so would interfere with their collection efforts by inducing cash-strapped debtors to spend on other products or services. Servicers, on the other hand, do cross-sell to their customers

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<sup>87</sup> 123 Cong. Rec. 3763 (February 7, 1977) (statement of Sen. Biden).

<sup>88</sup> 122 Cong. Rec. 22502 (July 19, 1976) (statement of Rep. Wylie).

<sup>89</sup> 123 Cong. Rec. 10248 (April 4, 1977).

and therefore have an incentive to maintain a positive image and good customer relations.

The FDCPA does not and should not apply to mortgage servicers because they are more like creditors than debt collectors.

D. CONFIRMATIONS THAT THE FDCPA DOES NOT APPLY TO MORTGAGE LOANS

The statutory language confirms the legislative history that the FDCPA does not apply to mortgage servicers. The FDCPA includes debt validation and cease-communication protections that would be nonsensical or harmful to mortgage borrowers. Congress could not have created these provisions as consumer protections. The only logical reading is that the statute does not apply to mortgage servicers.

*1. FDCPA Debt Validation Demonstrates that the FDCPA Does Not Apply to Mortgage Loans*

The FDCPA permits consumers to dispute the validity or the amount of debts that debt collectors pursue, but this process addresses an issue that does not apply to mortgage servicers.

The FDCPA requires debt collectors to provide identifying information about the debt with, or in five days of, their initial communications with consumers. This information must identify the creditor to whom the debt is currently owed, indicate the amount of the debt, and inform consumers of their right to dispute the debt and to request the name of the original creditor within 30 days. In the event of a dispute within 30 days, debt collection activity must cease as to the disputed amount until the collector validates the debt. Once validated, debt collection can continue.

Understandably, Congress wanted debt collectors not to pursue the wrong persons or the wrong debts:

“Sometimes the debts are not bona fide. Often the wrong person is contacted because of mistaken identity or inaccurate information.”<sup>90</sup>

In writing the FDCPA, Congress needed to decide how much information debt collectors should have about a consumer and a debt before the debt collector may contact the consumer. Congress balanced the interests of debt collectors, who have an incentive to work quickly, and the rights of consumers, who may disagree about the debt’s validity. Congress struck a compromise on this issue. Debt collectors may proceed with partial information, but must tell consumers of their right to challenge the validity of the debt,

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<sup>90</sup> 123 Cong. Rec 10246 (April 4, 1977) (statement of Rep. Reuss, Chairman of the House Committee on Banking, Finance, and Urban Affairs).

and upon a timely challenge, debt collectors must validate the disputed debt or stop collection activities. This compromise is a significant policy decision underlying the structure of the FDCPA.

Regardless of how Congress made this compromise or why it drew the line as it did, the question simply does not arise as to mortgage servicers. The question of how much information a mortgage servicer must have before contacting a consumer never arises because servicers are required at all times to have the entire loan file, even if the loan never defaults.<sup>91</sup> There is no need to apply the FDCPA debt validation procedure because it would be duplicative as to servicers and would offer no protection that consumers do not already have.

The CFPB's mortgagee regulations require mortgage servicers to be in continuous contact with consumers, such as by sending periodic statements, in part to make any disputes apparent quickly. When they arise, the CFPB's mortgage regulations require servicers to address them. Regulation X information request procedures and error resolution procedures enable consumers, and require servicers, to resolve such disputes quickly. Servicers cannot wait until the loan is delinquent before responding to disputes, as the FDCPA permits.

It would be nonsensical to have two dispute resolution procedures for mortgage loans subject to the FDCPA and only one for other mortgage loans because the FDCPA's applicability is based on the happenstance of loan or servicing transfers that have no relation to the loan or to debt collection. The logical reading is that the FDCPA does not apply to mortgage loans.

## ***2. Cease-Communications Demonstrate that the FDCPA Does Not Apply to Mortgage Loans***

The FDCPA's cease-communication right can be very harmful to consumers by keeping them in the dark about important information. It is not reasonable to believe that Congress intended consumers to receive virtually no communication about their mortgage loans. Indeed, it would be nonsensical for a consumer who is 60 days delinquent at the time of a loan or servicing transfer to receive less information or more misleading information than a consumer who became 60 days delinquent *after* the transfer. The only logical reconciliation of cease-communication rights and the many laws that require servicers to communicate with mortgage borrowers is that Congress did not intend the FDCPA to apply to mortgage loans.

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<sup>91</sup> See, e.g., the requirement that servicers be able to retrieve the entire loan file in only five days. 12 C.F.R. § 1024.38(c)(2).

3. ***The FDCPA and Dodd-Frank Act Demonstrate that the FDCPA Does Not Apply to Mortgage Loans***

The FDCPA and Dodd-Frank Act both prohibit unfair, deceptive, and abusive practices.<sup>92</sup> By providing FDCPA debt validation notices that inaccurately describe validation rights, or by honoring cease-communication notices that may cause a default, servicers risk liability for violating the Dodd-Frank Act by complying with the FDCPA. It would be unreasonable to read the FDCPA to require what both the FDCPA and the Dodd-Frank Act were designed to prohibit – unfair, deceptive, or abusive practices.

In enacting Dodd-Frank, Congress made one FDCPA amendment that is significant here – Congress authorized FDCPA rulewriting. This can be reasonably construed as Congressional intent that the CFPB revise the FDCPA requirements to be consistent with the more recent and more protective mortgage requirements. The rulewriting authority provides the ability to remove both the FDCPA’s potential for consumer harm and its regulatory overlap with more modern mortgage laws.

The Dodd-Frank Act prohibitions on what the FDCPA would require mortgage servicers to do, coupled with FDCPA rulewriting authority to prevent unintended and inconsistent results, both demonstrate that the FDCPA does not apply to mortgage loans.

E. DEBT VALIDATION PROVIDES LESS PROTECTION THAN SERVICING LAWS PROVIDE

The FDCPA requires debt collectors to send consumers certain debt validation information within five days of their initial communication with consumers. It would not make sense to require servicers to send this information at a single point in time after a loan is in default. The FDCPA debt validation process is an outgrowth of a Congressional decision to permit debt collectors to contact consumers before the debt collector obtains detailed loan information. Servicers are not permitted to operate with partial loan information, so the entire purpose of the FDCPA process is unnecessary and redundant for servicers. The information required for FDCPA debt validation includes the following:

An initial communication with a consumer.<sup>93</sup> Servicers are in communication with consumers from loan origination and continuously thereafter. For FDCPA purposes, what is a servicer’s initial communication? Must it relate to debt collection? If so, which parts of servicing are and are not debt collection? If a consumer calls a servicer with a question and the servicer responds, could that be the initial communication? We can imagine no purpose for a definition because the entire debt validation procedure has no purpose or benefit for mortgage loans.

<sup>92</sup> See, e.g., FDCPA §§ 806 – 808, 15 U.S.C. §§ 1692d – 1692f, and Dodd-Frank Act § 1036(a)(1)(B), 12 U.S.C. § 5536(a)(1)(B).

<sup>93</sup> FDCPA § 809(a), 15 U.S.C. § 1692g(a).

The amount of the debt.<sup>94</sup> Servicers notify consumers of the amount of the debt every month in their periodic statements, upon request under § 1024.36, online at almost all times, and by phone query at almost all times. There is no need to require servicers to repeat the same information.

The name of the creditor.<sup>95</sup> The FDCPA requires debt collectors to provide the creditor's name because the consumer may not recognize the debt collector. The debt collector is new to the consumer. Consumers do know who their servicer is because servicers need to tell consumers in all cases so consumers will know to whom to send loan payments. Further, servicers must notify consumers whenever the loan is transferred,<sup>96</sup> and whenever the servicing is transferred.<sup>97</sup> Servicers must also provide the same information upon request. There is no need for another requirement that servicers repeat the same information.

Notice of 30 days to dispute the debt, and that the debt collector will otherwise assume it is valid.<sup>98</sup> The required information must state that the consumer has 30 days to dispute the debt, and that otherwise the debt collector will assume the debt is valid. As to mortgage loans, this would be inaccurate and misleading in two ways. First consumers may dispute their debt with their servicer, and request loan information, at any time during the life of the loan,<sup>99</sup> regardless of any default, and regardless of whether the loan or servicing transferred. Second, servicers cannot "assume" a mortgage loan is valid based on the lack of consumer challenge. They must maintain accurate records at all times.<sup>100</sup>

Notice of verification requirement.<sup>101</sup> The FDCPA validation information must state that if the consumer disputes the debt within 30 days, the debt collector will provide verification of the debt. This repeats, but is narrower than, the requirements that servicers inform consumers of how to request information and assert errors.<sup>102</sup> It would be inaccurate to tell consumers that the servicer has not validated the debt while servicers must validate mortgage loans on an ongoing basis. It would be misleading to tell

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<sup>94</sup> FDCPA § 809(a)(1), 15 U.S.C. § 1692g(a)(1).

<sup>95</sup> FDCPA § 809(a)(2), 15 U.S.C. § 1692g(a)(2).

<sup>96</sup> 12 C.F.R. § 1026.39(b)

<sup>97</sup> 12 C.F.R. § 1024.33(b).

<sup>98</sup> FDCPA § 809(a)(3), 15 U.S.C. § 1692g(a)(3).

<sup>99</sup> 12 C.F.R. § 1024.35 and § 1024.36.

<sup>100</sup> *See, e.g.*, 12 C.F.R. § 1024.38, which requires servicers to have policies and procedures to ensure: accurate and timely disclosures to borrowers required under any applicable law; investigate, respond to, and correct, borrower complaint and error assertions; provide accurate and timely responses to borrower requests for information about their loans; and provide accurate and timely information to investors; accurate foreclosure filings that comply with applicable law.

<sup>101</sup> FDCPA § 809(a)(4), 15 U.S.C. § 1692g(a)(4).

<sup>102</sup> 12 C.F.R. §§ 1024.35(c), 1024.36(a), and 1026.41(d)(6).

consumers that there is some validation procedure available only if they act, because that is contrary to the continuing validation requirements that permeate mortgage servicing laws, and that do not require consumer action.

Notice of 30 days to ask the name of the original creditor.<sup>103</sup> The FDCPA information must include notice that consumers have 30 days within which to request the name of the original creditor. This would be inaccurate as to a mortgage loan. Mortgage borrowers can request that information from their servicers at any time, and they are told when their loan is transferred. Further, the FDCPA notice could mislead consumers into believing that the original creditor is still involved in the loan, even if that creditor has sold the loan and servicing. It would be mislead to tell consumers that they only have a 30-day window to request the identity of a party, especially because that may be the wrong party.

FDCPA debt validation simply has no purpose for mortgage loans. The lack of use for the FDCPA's debt validation procedure is a strong reason not to apply the FDCPA to mortgage loans in any case.

F. MORTGAGE SERVICING LAWS INCLUDE ALL THE FDCPA PROTECTIONS

Applying the FDCPA to mortgage loans would not result in protections to consumers. Aside from the cease-communication right, which is harmful to consumers, each of the FDCPA protections exist elsewhere in mortgage laws.

***1. The FDCPA and Dodd-Frank Act Prohibit the Same Collection Practices***

The FDCPA prohibits a number of specific debt collection practices. These are harassment or abusive practices,<sup>104</sup> false or misleading practices,<sup>105</sup> and unfair practices.<sup>106</sup> The Dodd-Frank Act prohibits engaging in “any unfair, deceptive, or abusive act or practice”<sup>107</sup> by covered persons regardless of whether they are debt collectors.

The FDCPA prohibitions on unfair debt collection practices are therefore no longer effective for any person the CFPB regulates.

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<sup>103</sup> FDCPA § 809(a)(1), 15 U.S.C. § 1692g(a)(1).

<sup>104</sup> FDCPA § 806, 15 U.S.C. § 1692d.

<sup>105</sup> FDCPA § 807 and § 812, 15 U.S.C. § 1692e and § 1692j.

<sup>106</sup> FDCPA § 808, 15 U.S.C. § 1692f.

<sup>107</sup> Dodd-Frank Act § 1036(a)(1)(B), 12 U.S.C. § 5536(a)(1)(B).

**2. *The GLBA Privacy Protections Duplicate the FDCPA Privacy Protections***

The FDCPA prohibits debt collectors from disclosing to third parties that a consumer owes a debt;<sup>108</sup> it prohibits the debt collector from communicating with third parties regarding the debt;<sup>109</sup> it prohibits publishing lists of consumers who allegedly refuse to pay debts,<sup>110</sup> communicating about the debt by post card,<sup>111</sup> including on an envelope an indication that the debt collector is in the debt collection business;<sup>112</sup> and it prohibits disclosing the existence of a debt in acquiring location information.<sup>113</sup>

Each of these is prohibited by the GLBA consumer financial privacy protections.<sup>114</sup> The FDCPA privacy protections are therefore no longer effective for any person the CFPB regulates or that is subject to the GLBA privacy protections.

**3. *The FDCPA Combined-Payment Restriction Has No Meaning for Mortgage Loans***

The FDCPA provides that if one consumer has multiple debts and makes a single payment to a debt collector, the debt collector may not apply any portion of the payment to a disputed portion of a debt.<sup>115</sup> In a mortgage context, this does not have meaning because mortgage payments must specify the loan on which they are made. Unlike debt collection firms, for whom the FDCPA was designed, mortgage servicers process loan payments through automated systems. These automated systems require a single loan number for each payment. The requirement that servicers process and credit payments promptly<sup>116</sup> requires automation. Given the need for automation, the CFPB has recognized that servicers cannot handle correspondence with payments.<sup>117</sup>

There is no need to apply the FDCPA's restriction concerning a single payment on multiple debts to mortgage servicers.

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<sup>108</sup> FDCPA § 805(b), 15 U.S.C. § 1692c(b).

<sup>109</sup> FDCPA § 805(b), 15 U.S.C. § 1692c(b).

<sup>110</sup> FDCPA § 806(3), 15 U.S.C. § 1692d(3).

<sup>111</sup> FDCPA § 804(4) and § 808(7), 15 U.S.C. § 1692b(4) and § 1692f(7).

<sup>112</sup> FDCPA § 804(5) and § 808(8), 15 U.S.C. § 1692b(5) and § 1692f(8).

<sup>113</sup> FDCPA § 804(1), (2), (3), and (5), 15 U.S.C. § 1692b(1), (2), (3), and (5).

<sup>114</sup> 12 C.F.R. § 1016.10.

<sup>115</sup> FDCPA § 810, 15 U.S.C. § 1692h.

<sup>116</sup> 12 C.F.R. § 1026.36(c)(1).

<sup>117</sup> 12 C.F.R. § 1024.35(a) (notices on payment forms need not be treated as error assertions); 12 C.F.R. § 1024.36(a) (information requests on payment forms need not be treated as information requests).



G. FDCPA OR RESPA AUTHORITY?

Under the proposed regulation, when a borrower sends an FDCPA cease-communication notice, a servicer subject to the FDCPA with respect to that loan would be exempt from some of the early intervention requirements in § 1024.39. However, the servicer still “[m]ust comply with” the written early intervention notice requirements if loss mitigation options are available.<sup>118</sup> Additionally, the proposed commentary provides that a Regulation X notice does not violate the FDCPA in certain circumstances.<sup>119</sup> That is, the proposed Regulation X amendments would state what the FDCPA requires and permits. The Regulation X commentary provides that good faith compliance with that commentary affords protection from liability under RESPA,<sup>120</sup> but not under any other law.

In the discussion of its legal authority, and in its section-by-section analysis, the CFPB states:

“The Bureau also exercises its authority to prescribe rules with respect to the collection of debts by debt collectors pursuant to section 814(d) of the FDCPA, 15 U.S.C. 1692l(d). For the reasons discussed below, the Bureau proposes to rely on this authority to clarify a borrower’s cease communication protections under section 805(c) of the FDCPA and to interpret the exceptions set forth in section 805(c)(2) and (3) of the FDCPA to include the written early intervention notice required by proposed § 1024.39(d)(2)(iii). The proposed rule also includes Bureau advisory opinions for purposes of section 813(e) of the FDCPA, 15 U.S.C. 1692k(e).”<sup>121</sup>

“To the extent a servicer would be required to provide the modified written notice under § 1024.39(d)(2)(iii), the proposal provides the servicer with a safe harbor from liability under the FDCPA.”<sup>122</sup>

However, in the proposed amendments to Regulation X themselves, in citing its authority for the amendments, the CFPB relies on its RESPA authority, its general rulewriting

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<sup>118</sup> Proposed § 1024.39(d)(2).

<sup>119</sup> Proposed comment 39(d)(2)(iii)-1 provides:

“Communications under the FDCPA. To the extent the FDCPA applies to a servicer’s communications with a borrower, a servicer does not violate FDCPA section 805(c) by providing the written notice required by § 1024.39(d)(2)(iii) after a borrower has sent a notification pursuant to FDCPA section 805(c) with respect to that borrower’s loan. In providing the borrower the written notice, the servicer must continue to comply with all other applicable provisions of the FDCPA, including prohibitions on unfair, deceptive, and abusive practices as contained in FDCPA sections 805 through 808 (15 U.S.C. 1692c through 1692f).”

<sup>120</sup> Regulation X comment 1.

<sup>121</sup> 79 Fed. Reg. 74176, 74179 (December 15, 2014).

<sup>122</sup> 79 Fed. Reg. 74176, 74207-08 (December 15, 2014).

authority, and its authority to require disclosures, but not on its FDCPA authority.<sup>123</sup> Nor does the CFPB cite its FDCPA authority for the proposed Regulation Z amendments.<sup>124</sup>

It is not certain that courts would agree that reliance on Regulation X or its commentary can be a defense to allegations of FDCPA violations, or that RESPA authorizes the CFPB to make FDCPA exemptions. This may especially be true where the CFPB has, but does not use, FDCPA authority to issue the regulations in this proposal. We urge the CFPB to be clear that it relies on its FDCPA authority for its FDCPA exemptions so that its safe harbor will have the intended effect.

The section-by-section analysis also states:

“Consistent with the discussion in this section, the Bureau is proposing to issue an advisory opinion interpreting the FDCPA cease communication requirement in relation to the Mortgage Servicing Rules under FDCPA section 813(e) (15 U.S.C. 1692k(e)). . . . For the reasons discussed below, the Bureau is proposing to provide a safe harbor for certain communications between a servicer and a borrower notwithstanding a borrower’s invocation of the ‘cease communication’ right.”<sup>125</sup>

The proposed advisory opinion is apparently not part of the present rulemaking. We recommend that the CFPB publish it for public comment. To ensure that it is effective, we urge the CFPB to base its opinion explicitly on FDCPA authority.

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<sup>123</sup> The proposal states that “The authority citation for part 1024 continues to read as follows” and cites sections of RESPA and of the Dodd-Frank Act, but not any part of the FDCPA. 79 Fed. Reg. 74176, 74285 (December 15, 2014). The Dodd-Frank Act provisions cited include § 1061, 12 U.S.C. § 5581, which transferred certain FDCPA authorities from the Federal Trade Commission (“FTC”) to the CFPB. However, just before that transfer, the FDCPA prohibited the FTC from writing FDCPA regulations. FDCPA § 814(d), 15 U.S.C. § 1692l. The proposal does not cite for its authority Dodd-Frank Act § 1089, the one provision that amended FDCPA § 814(d) to provide the CFPB with FDCPA rulewriting authority. The proposal also cites Dodd-Frank Act §§ 1022 and 1032, 12 U.S.C. §§ 5512 and 5532. These provide the CFPB with general rulewriting authority and authority to require disclosures.

<sup>124</sup> The proposal states that “The authority citation for part 1026 continues to read as follows” and cites TILA, sections of RESPA and the Dodd-Frank Act, but not any part of the FDCPA. Again, the CFPB cites Dodd-Frank Act § 1061, which transferred FDCPA authority from the FTC to the CFPB, but not Dodd-Frank Act § 1089, which authorizes the CFPB to write FDCPA exemptions. 79 Fed. Reg. 74176, 74295 (December 15, 2014).

<sup>125</sup> 79 Fed. Reg. 74176, 74207 (December 15, 2014).

## H. PRACTICAL PROBLEMS

If the CFPB does apply the FDCPA to mortgage servicers, and does require servicers to honor cease-communications notices, several compliance issues arise.

### 1. *Compliance with “Cafeteria-Style” Notices Is Not Feasible*

The CFPB proposes to create a safe harbor that would permit certain communications from a servicer to a consumer who has exercised a cease-communication right.<sup>126</sup> The CFPB released a bulletin that creates a safe harbor for communications required by some, but not all, laws, despite a cease-communication notice. The bulletin did not include in the safe harbor early intervention communication and rate-reset notices because they are not required by statute and are not sent upon consumer request.<sup>127</sup> The present rulemaking would require some but not all early intervention communications despite a cease-communication notice, but does not address rate-reset notices.

The FDCPA does not recognize partial or conditional cease-communication notices. It does not distinguish between communication required by a statute and communication required by a regulation. It does not distinguish between requested and unrequested communications.

We are concerned that the CFPB may believe that servicers can reasonably comply with partial, intermittent, or “cafeteria-style” cease communications whereby consumers can elect which individual communications they do and do not want, and when they want them.

Servicers manage thousands of different communications for mortgage loans, covering a variety of fact situations that can arise. This does not mean thousands of communications industry-wide, but thousands within an individual servicer. It is simply not feasible for servicers to examine each communication they manage to determine whether it does or does not relate to communication a consumer requested or rejected, or to communication a consumer requested or rejected by implication. Such a fluid requirement would create an unworkable minefield that would serve neither the consumer nor the servicer.

If a consumer were to send an information request about a rate adjustment, would or could that be a request for a rate-reset notice? If so, and the rate-reset notice deadline had passed, would the information request mean the servicer is retroactively in violation of the requirement to send the rate-reset notice? If the servicer were required to send the rate-reset notice upon request, and there have been more than one resets since the cease-communication, would the servicer be required to send more than one reset notices or just the most recent? Would it depend on the language in the request? How specific would

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<sup>126</sup> 79 Fed. Reg. 74176, 74208 (December 15, 2014).

<sup>127</sup> CFPB [Bulletin 2013-12](#).

the language need to be? Would the servicer be permitted to communicate with the consumer to seek further clarification about what the consumer requested, or would the servicer need to guess?

When the FDCPA prohibits communication that another law requires, servicers need a yes or no answer about whether the communication is required or prohibited. “Cafeteria-style” cease-communication notices would be disproportionately complex to manage, and compliance would always be uncertain. The CFPB would be besieged with requests for guidance about what is required and what is prohibited. Litigation would result in inconsistent results, making the law even murkier and the protections even less sensible – consumers in one state might get rate-reset notices while consumers in another state do not.

Compliance with a cafeteria-style cease-communication would require servicers to document:

- Whether the FDCPA applies and whether its application is based on a default at the time of a loan transfer or of a servicing transfer;
- What definition of default the servicer applied (the FDCPA has none);
- What communications the notice did, did not, and might have, requested the servicer to terminate or resume;
- Each reason the servicer has for sending each communication sent;
- Each reason the servicer has for not sending communications that were not clearly requested.

Cafeteria-style cease-communication notices would require compliance resources well out of proportion to the purpose of the notices, if those notices even have a purpose related to mortgage loans. If the CFPB will continue to require mortgage servicers to honor cease-communication notices, it should not require compliance with cafeteria-style, partial, or conditional notices.

## ***2. The CFPB Should Permit Servicers to Comply with Federal and State Laws***

Many federal and state laws require servicers to communicate with consumers. The FDCPA does not preempt federal law but conflicts with it. The FDCPA preempts state law only if the law relates to debt collection, and only to the extent the state law is inconsistent with the FDCPA, but not if the state law provides greater protection than the FDCPA.<sup>128</sup>

Servicers must comply with applicable federal and state law. For example, the IRS requires servicers to annually send consumers information about the amount of interest

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<sup>128</sup> FDCPA § 816, 15 U.S.C. § 1692n.

they paid on their mortgage debt. If the CFPB will require consumers to honor cease-communication notices, we recommend it make an express exemption, using its FDCPA authority, for all communications required by federal law. Anything else would result in a conflict of laws.

At least two states prohibit debt collection communication to consumers who are represented by attorneys, similar to § 805(a)(2) of the FDCPA, even when the consumer has not elected to cease debt collection communications.<sup>129</sup> We question whether consumers would be better protected by receiving certain servicer communications directly, especially where immediate notice can enable consumers to best protect their rights. Nevertheless, servicers must comply with all applicable laws.

We recommend that the CFPB provide an explicit safe harbor from the FDCPA, using its FDCPA authority, that permits servicers to comply with all applicable state and local laws without risk of FDCPA liability. We also urge the CFPB to make clear that compliance with any applicable federal or state law cannot be a violation of the Federal consumer financial laws, including RESPA, TILA, the FDCPA, or the Dodd-Frank Act prohibition on unfair, deceptive, and abusive acts or practices.<sup>130</sup>

### ***3. Refusal to Pay a Debt Should Not Terminate Communication***

The CFPB notes that, under § 805(c), a consumer exercises a cease-communication right by notifying a servicer that the borrower refuses to pay a debt.<sup>131</sup> The FDCPA defines debt broadly to include “any obligation or alleged obligation” to pay money arising out of a transaction in which the money, property, or services are primarily for personal or household purposes. A consumer may contest a minor loan fee or charge but not the loan

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<sup>129</sup> Florida law provides:

“In collecting consumer debts, no person shall . . . [c]ommunicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney’s name and address, unless the debtor’s attorney fails to respond within 30 days to a communication from the person, unless the debtor’s attorney consents to a direct communication with the debtor, or unless the debtor initiates the communication.”

Florida Stat. Ch. 559.72(18). Servicers are subject to administrative and civil liability for noncompliance. Florida Stat. Ch. 559.727; 559.730; 559.77; and 559.78. West Virginia Law provides:

“No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section . . .

(e) Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney’s name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.”

W. Va. Code § 46A-2-128. Servicers can be liable for violations. W. Va. Code §§ 46A-5-101 and 104, and can be criminally liable for willful violations. §§ 46A-5-101.

<sup>130</sup> Dodd-Frank Act § 1036, 12 U.S.C. § 5536.

<sup>131</sup> 79 Fed. Reg. 74176, 74207 n. 123 (December 15, 2014).

itself. Each fee and charge appears to fall within the FDCPA definition of debt, but disputed fees or charges should be handled under the Regulation X error resolution procedures, not the FDCPA. If the FDCPA cease-communication notice is binding, refusal to pay a portion of the debt should not terminate communication.

I. RECOMMENDATIONS

Applying the FDCPA to mortgage servicers and to mortgage loans is fraught with problems because it has the potential to interfere with more protective mortgage servicing laws. The CFPB should use its FDCPA authority to clearly exempt mortgage loans and mortgage servicers from the FDCPA.

At a minimum, the CFPB should, using its FDCPA authority, exempt mortgage servicers and mortgage loans from the FDCPA debt validation and cease-communication requirements.

This is the only construction of the FDCPA by which the CFPB can protect mortgage borrowers from increased risk of harm. It is not reasonable to believe Congress intended any other result.

### **III. EARLY INTERVENTION**

#### **A. DESCRIPTION OF THE EARLY INTERVENTION PROPOSAL**

Currently, Regulation X requires two types of early intervention, attempted live contact by day 36 of the borrower's delinquency,<sup>132</sup> and a written notice of possible loss mitigation options by day 45 of the borrower's delinquency, provided that the servicer is not required to provide written notice more than once during any 180-day period.<sup>133</sup> By interim final regulation, the CFPB exempted servicers from the live contact and written notice requirements in the case of bankruptcy and, in case of a loan subject to the FDCPA, if the borrower sends a cease-communication notice.

The CFPB proposes to amend the requirements with respect to FDCPA cease-communication notices. For loans subject to the FDCPA for which a borrower sent a cease communication notice, the servicer would be exempt from the live contact requirement in all cases, and from the written notice requirement if no loss mitigation options are available. When the written notice is required, it would need to contain FDCPA-specific language that the servicer has a right to invoke foreclosure, and the written notice would be prohibited twice in 180 days.

The CFPB would not require attempted live contact if the borrower is a debtor in bankruptcy, any borrower on the loan is in Chapter 12 or 13, or the borrower has discharged personal liability for the loan through bankruptcy.

The CFPB would not require early intervention written notice in the bankruptcy context in two circumstances. First, when attempted live contact is not required and no loss mitigation is available. Second, when the borrower is a debtor in bankruptcy and any of the following is true:

- A confirmed reorganization plan provides for surrender of the property, avoidance of the lien, or does not provide for paying the pre-bankruptcy arrearage or payments due on the loan;
- The borrower files a § 521(a) Statement of Intention to surrender the property; or
- A bankruptcy court order provides for avoidance of the lien or lifting the automatic stay.

We are concerned that the proposal would create a disproportionately complex maze of rules governing a disclosure of little import.

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<sup>132</sup> 12 C.F.R. § 1024.39(a).

<sup>133</sup> 12 C.F.R. § 1024.39(b).

B. EARLY INTERVENTION AND THE FDCPA

If the CFPB will continue to apply the FDCPA to mortgage servicers, and believes that cease-communication serve a purpose for mortgage borrowers, it would be inconsistent to require early intervention after a cease-communication notice. We believe the better approach would be for the FDCPA not to apply to mortgage loans, and for early intervention requirements to apply equally to all mortgage borrowers.

If the CFPB will require servicers to honor cease-communication notices and to provide early intervention communications after receiving such a notice, we have the following concerns.

1. *The FDCPA Should Not Require Amended Early Intervention Notice*

The CFPB proposes that if a borrower has sent an FDCPA cease communication notice, an early intervention written notice would need language not otherwise required in the notice, namely, that the servicer has a right to invoke foreclosure.<sup>134</sup> This is not helpful.

The FDCPA permits, but does not require, this language.<sup>135</sup> The language appears designed for unsecured debt. In the case of an unsecured debt, a notice that a debt collector may invoke specified remedies may convey information because debt collectors often do not pursue unsecured debts through legal process. With respect to mortgage loans, consumers know their mortgage lenders have a security interest in the property – that is the plain English definition of mortgage. Further, consumers receive ample notice when a servicer initiates foreclosure. In cases where the servicer does not have an immediate intent to seek foreclosure, this written statement would be inaccurate and misleading. If including the statement is conditional on the servicer's intent, it would add yet one more factor – and a subjective one at that – that the servicer would have to operationalize and automate, in what is already proposed to be an extremely complex set of procedural hurdles for such a minor notice.

Managing two versions of an early intervention notice would impose unnecessary regulatory burden. This burden would not be offset by consumer benefit because the notice, in the mortgage context, would state what consumers already know. As a result, we urge the CFPB to eliminate the modified statement. It is too complex and does not offer value. CFPB would have to provide a safe harbor for servicers to communicate with borrowers to avoid conflict with FDCPA as it stands today.

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<sup>134</sup> Proposed § 1024.39(d)(2)(iii)(A).

<sup>135</sup> FDCPA § 805(c)(3), 15 U.S.C. § 1692c(c)(3).



## 2. *The Exactly-180-Day Prohibition Is Operationally Too Rigid*

The proposed rule would prohibit servicers from sending an early intervention written notice twice within a 180-day delinquency to a borrower whose loan is subject to the FDCPA and who sent a cease-communication notice. We believe the modified statement, including the exactly-180-day prohibition, is too rigid and should be eliminated. The current option to send the notice at least 180 days from the previous notice has already proven too difficult for many servicers to operationalize and as a result, some servicers send the 45-day notice every month a payment is missed. Mandating that servicers in covered cases send the notice exactly 180 days apart, no sooner and no later, is too rigid and would set up servicers for unavoidable failure. Allow us to illustrate.

Suppose a borrower missed a payment due January 1, 2015 and made no subsequent payments. The first notice would be due by February 15, 2015. That day is a Sunday, so the servicer would need to send the notice early. Suppose the servicer sends it February 13. The next notice would be prohibited before August 13. The notice regarding the July 1 missed payment would be due by August 15, which is a Saturday, so the servicer would need to send it early. The servicer would have only August 13 or 14 to send the second notice. This “calendar squeeze” would not leave time to cover all the myriad things that can go wrong in producing a notice – a power failure, a storm, a closed bridge, a machine breakdown, several of these at once, and so on.

We suggest that the CFPB retain the current option of sending written notices monthly, but to also permit servicers, at their discretion, not to duplicate the notice repeatedly. We highly recommend that the CFPB consider adjusting the proposal to allow servicers to send the written notice only once in connection with two payments that were due within one year of each other. Tying the notice requirement to a late payment rather than to the time between notices would be easier to administer, and would prevent the calendar squeeze problem. Leeway is especially appropriate because the borrower has already been informed of loss mitigation and has had months to act on it. There is no urgency for a repeat notice.

In addition, sending the notice should be permissible upon request. When the notice is prohibited, a consumer may request another copy of the notice, under § 1024.36(a) (information requests) or otherwise. Consumers likely will not request the notice itself because it is not significant, but may request a copy of all correspondence related to a delinquency, which may include the early intervention notice. If the request is under § 1024.36(a), the servicer would be both required to provide the notice under § 1024.36 and prohibited from providing it under § 1024.39. We recommend that servicers should be permitted to provide the notice upon request at any time, under § 1024.36(a) or otherwise.

### **3. *Cease-Communication Notice Should be Effective When Received***

Proposed § 1024.39(d)(2) includes an early intervention exemption if the borrower “has sent” an FDCPA cease-communication notice. The FDCPA, on the other hand, is based on the debt collector’s receipt of the notice:

“If such [cease communication] notice from the consumer is made by mail, notification shall be complete upon receipt.”<sup>136</sup>

To the extent CFPB continues to apply the FDCPA to mortgage servicers, it would be far simpler and more reasonable to apply the cease-communication protections, and the Regulation X exemption, only after the servicer receives the notice. Otherwise, if a consumer neglects to include proper postage on the notice or sends the notice to the wrong address, the servicer has no ability to comply.

Consistent with the FDCPA requirements, we recommend replacing the phrase “a borrower has sent a notification” with “the servicer has received a notification” in § 1024.39(d)(2) and its commentary.

### **4. *When Is Loss Mitigation Available?***

Under current law, if loss mitigation options are available, the notice must contain § 1024.39(b)(2)(iii) disclosures. Proposed comment 39(b)(2)-4 provides:

“Loss mitigation options are available if the owner or assignee of a borrower’s mortgage loan offers an alternative to foreclosure that is made available through the servicer. The availability of loss mitigation options does not depend upon a borrower’s eligibility for those options, but simply depends upon whether the owner or assignee of a borrower’s mortgage loan generally offers loss mitigation options through the servicer.”

On the other hand, current commentary seems to imply one investor can make loss mitigation available to some but not all borrowers.<sup>137</sup> Are there multiple standards for when loss mitigation is available? Does commentary under 41(c) apply under § 1024.39?

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<sup>136</sup> FDCPA § 805(c), 15 U.S.C. § 1692c(c).

<sup>137</sup> Comment 41(c)(1)-2.ii provides:

“The owner or assignee of a borrower’s mortgage loan has established pilot programs, temporary programs, or programs that are limited by the number of participating borrowers. Such loss mitigation options are available to a borrower. However, a servicer evaluates whether a borrower is eligible for any such program consistent with criteria established by an owner or assignee of a mortgage loan. For example, if an owner or assignee has limited a pilot program to a certain geographic area or to a limited number of participants, and the servicer determines that a borrower is not eligible based on any such requirement, the servicer shall inform the borrower that the investor requirement for the program is the basis for the denial.”

**5. *Servicers May Not Know Consumers Have Representation***

Proposed comment 39(d)(2)(iii)-2 provides that, if the FDCPA applies to a servicer's communications and the borrower sends a cease-communication notice, the § 1024.39(d)(2) modified written notice is not required if the borrower is in bankruptcy and is "not represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf." We suggest amending the language as follows:

**"not reasonably known to the servicer to be** represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf."

**6. *Form of Notice Should Not Matter***

The proposed FDCPA exemptions from early intervention requirements apply when the FDCPA applies and consumers send cease-communication notices "pursuant to" FDCPA § 805(c). A consumer may send a cease-communication notice citing only state law or citing no law, which may not be "pursuant to" federal law. If the FDCPA cease-communication notice is binding, we suggest that the regulation reference cease-communication notices, without specifying which law in particular the consumer invoked.

**C. EARLY INTERVENTION AND BANKRUPTCY**

**1. *Early Intervention Is Inconsistent with Bankruptcy Protections***

We support the proposal not to require attempted live contact when the borrower is in bankruptcy. This is appropriate because telephone calls reminding a debtor about an unpaid debt are inconsistent with the automatic stay and with the discharge injunction.

As proposed, if there are two borrowers on one loan and only one is protected by bankruptcy, attempted live contact would not be required if the bankruptcy is a Chapter 12 or 13 case, but would be required for a non-filing co-borrower if the bankruptcy is a Chapter 7 or 11 case. We suggest that attempted live contact should not be required regardless of the bankruptcy chapter. The servicer cannot prevent the bankruptcy debtor from answering the phone, listening to a message, or reading an electronic message.

We believe there should be an exemption from the early intervention written notice requirement when the borrower is a debtor in bankruptcy, any borrower on the loan is in Chapter 12 or 13, or the borrower has discharged personal liability for the loan through bankruptcy, regardless of whether loss mitigation may be available. We do not believe the written notice is helpful to a borrower who has filed a bankruptcy petition. Even if sending such a notice does not violate the letter of bankruptcy law, it is inconsistent with the purposes of bankruptcy protections to send repeated notices that may or may not be consistent with applicable bankruptcy court orders, depending on the unique facts of the

borrower's bankruptcy case.

Courts have held that repeated communication after a discharge is inappropriate.<sup>138</sup> It is increasingly common for bankruptcy jurisdictions to adopt mortgage mediation procedures, and at least one mediation procedure prohibits written communication about the mediation outside the bankruptcy court portal.<sup>139</sup> Loss mitigation communications may not be treated consistently across jurisdictions. Building and maintaining separate rules for written notices in different jurisdictions would be excessive.

Weighed against possible interference with bankruptcy protections and rules is the fact that the proposed written notice would provide information that would always or virtually always be old news after a bankruptcy filing. The written notice is designed for intervention early in a delinquency, to ensure the borrower knows how to pursue loss mitigation. However, a consumer bankruptcy is a form of loss mitigation that the borrower has already elected, often because the borrower has defaulted under the mortgage loan, which may well already have been modified.

By the time a borrower files a bankruptcy petition, the mortgage loan has almost certainly been more than 45 days delinquent, so the borrower has already received the written notice at least once pre-filing, and more likely several times. The borrower has not only already been told about loss mitigation, the borrower may have already gone through an entire loss mitigation review. The borrower's bankruptcy attorney would also have told the borrower about loss mitigation, as would the bankruptcy court in many instances. Sending yet another written notice regarding loss mitigation would be redundant and potentially unwelcome following a debtor's decision to file a bankruptcy petition.

We support the proposal not to remove § 1024.29(c), which provides that nothing in § 1024.39 requires communication that applicable law prohibits.

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<sup>138</sup> *Schinabeck v. Wells Fargo Bank*, 2014 WL 5325781 (Bankr. E.D. Tex. Oct. 20, 2014) (communications that taken in isolation may be relatively harmless can “collectively erode” the protections of a discharge injunction). *Bibolotti v. American Home Mortgage Servicing*, 2013 WL 2147949 (Bankr. E.D. Tex. May 15, 2013) (a discharged debtor was “bombarded” by loss mitigation information, and, based on the amount of communication, the court found the communications to be debt collection).

<sup>139</sup> A [sample order](#) in the U.S. District Court for the Middle District of Florida provides:

“4. MMM Portal. Parties must use a secure Portal (e.g. <https://www.dclmwp.com/Home>) for the submission of all documents related to the MMM process. Parties may communicate outside the Portal orally and may file *duplicate* documents elsewhere, but *all* written communication relating to the MMM process shall occur through the Portal. Any litigated matters incidental to the mediation are considered separate matters, and parties are not required to use the Portal for these separate matters.”

## **2. *Bankruptcy Debtors Do Not Need Continuing Reminders***

As proposed, the written notice would be required every 180 days if the loan remains delinquent. Under a proposed definition, delinquency begins “on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow became due and unpaid[.]”<sup>140</sup> This appears to mean a periodic payment under the loan contract, so that in a Chapter 12 or 13 case with a pre-petition arrearage, the delinquency would last for the life of the plan and a written notice, designed to alert the borrower to loss mitigation options early in a delinquency, would be required repeatedly throughout the case.

As we point out in the section above, realistically, once a bankruptcy has been filed, it is virtually certain the “early intervention” notice would not convey any new or meaningful information.

## **3. *Chapter 13 Plan Filing Is Relevant Rather Than Confirmation***

For Chapter 13 debtors, the proposal would not require written notice when loss mitigation is available once the bankruptcy court enters an order confirming a plan that provides for the borrower to surrender the property or to avoid a lien. Conversely, in Chapter 7, the notice requirement would cease if the debtor were to file a § 521(a) statement of intent to surrender the property. There appears no reason for differentiating between conduct entirely within the debtor’s control as the operative event in chapter 7 proceedings, and requiring court action as the operative event under chapters 11, 12, and 13. Whether the plan has been confirmed or not, a debtor who files a plan with a surrender provision will not continue making payments. That debtor has already decided that loss mitigation is not something to be pursued. Consequently, neither written nor oral early intervention communication should be required.

We recommend that the reference to a plan in § 1024.39(d)(1)(ii)(C) refer to the debtor’s most recent filed, amended, or modified plan, without regard for whether the plan has been confirmed.

### **D. RECOMMENDATIONS**

We recommend not requiring attempted live contact if any borrower is in bankruptcy or has had debt discharged, regardless of the bankruptcy chapter. We recommend not requiring the written early intervention notice in any of those circumstances, regardless of whether loss mitigation may be available.

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<sup>140</sup> Proposed § 1024.31.

## IV. BANKRUPTCY STATEMENTS

### A. BACKGROUND AND OVERVIEW OF COMMENTS

The CFPB proposes to address the complex issues created by the intersection of Bankruptcy Code and a broad requirement that mortgage servicers send periodic statement to consumers. In the final servicing regulations released in January 2013,<sup>141</sup> the CFPB required servicers to send periodic statements to borrowers and contained no bankruptcy exemption. Many parties noted that such a requirement would put servicers in the position of having to choose whether to comply with the CFPB regulation or the Bankruptcy Code, and that the CFPB's broad requirements regarding periodic statements did not properly take into account the issues presented by Chapter 13 bankruptcies. In response, the CFPB released an interim final regulation that exempted loans from the periodic statement requirements while the consumer is a debtor in bankruptcy or if the debt had been discharged.<sup>142</sup> The CFPB explained at the time that the interim final regulation was not a permanent resolution of the problem:

“The Bureau believes that further study of these issues is warranted but cannot be concluded quickly enough to provide further calibration of the requirements before January 2014. Therefore, the interim final rule exempts servicers from the requirements of § 1026.41 for a mortgage loan while the consumer is a debtor in bankruptcy.”<sup>143</sup>

The present rulemaking proposes periodic statement requirements that are far more tailored to the circumstances of bankruptcy than either the original final regulation or the interim final regulation.

We support the intent behind the bankruptcy statement proposal. However, we seek an acknowledgement that that Chapter 12 and 13 statements may but need not include a breakdown of principal and interest for payments due or payments applied. We also note an unintended consequence regarding co-borrowers who do not file for bankruptcy protection. Finally, we discuss the time required to switch statement types, and we suggest additional clarifications.

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<sup>141</sup> Published at 78 Fed. Reg. 10902 (February 13, 2014).

<sup>142</sup> 12 C.F.R. § 1026.41(e)(5).

<sup>143</sup> 78 Fed. Reg. 62993, 63001 (October 23, 2013).

B. MAJOR COMMENTS

I. *Any Principal and Interest Breakdown Would Need to Be Contractual*

The CFPB proposes to require Chapter 13 statements to include a breakdown of the monthly payments that become due post-petition into principal and interest, both for the next payment due<sup>144</sup> and, after the payment is made, in the past payment breakdown.<sup>145</sup> The CFPB proposes not to require principal-interest breakdown for payments on the pre-petition arrearage.<sup>146</sup>

The proposal was not entirely clear about whether the proposed principal-interest breakdown would be based on the loan contract. We understand, based on a January 28, 2015 telephone call the Consumer Mortgage Coalition had with CFPB staff, that the drafters' intent was to propose contractual breakdowns. In the event the final regulation requires any principal and interest breakdowns in statements, this should be contractual.

However, because the Bankruptcy Code does not require any breakdown of payments into principal and interest components, we believe statements should not include this information.

a. *Chapter 13 Neither Requires Noncontractual Payment Application Nor Prohibits Contractual Payment Tracking*

Chapter 13 of the Bankruptcy Code is clear: a debtor may cure the pre-petition default on a mortgage loan over the life of the Chapter 13 plan while simultaneously making the regular monthly mortgage payments.<sup>147</sup> Typically, it is also impermissible for a Chapter 13 plan to modify the terms of a mortgage loan on a debtor's principal residence, unless the servicer agrees to the modification.<sup>148</sup> The Bankruptcy Code does not dictate how servicers must apply payments while a Chapter 13 case is pending.

We are aware that some have advocated that servicers be required to apply post-petition maintenance payments as if the loan were current as of the petition date, based on a

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<sup>144</sup> Proposed comment 41(f)(3)(iii)-1 (explanation of amount due) provides in part:

“Consistent with § 1026.41(d)(3)(i) [requiring principal-interest breakdown in past payment breakdown], the post-petition payments must be broken down by the amount, if any, that will be applied to principal, interest, and escrow.”

<sup>145</sup> Proposed § 1026.41(f)(3)(iv)(A) would require statements to indicate “[t]he total of all post-petition payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, and escrow . . . .”

<sup>146</sup> Proposed § 1026.41(f)(3)(ii) – (vi).

<sup>147</sup> 11 U.S.C. § 1322(b)(5).

<sup>148</sup> 11 U.S.C. § 1322(b)(2).

handful of decisions at the bankruptcy court level.<sup>149</sup> Even the small number of decisions on which these advocates rest their arguments are inconsistent on this point.<sup>150</sup> In addition, the majority of the issues which these decisions attempt to address on an *ad hoc* basis have been resolved today in a uniform fashion as a result of the adoption of Bankruptcy Rule 3002.1.<sup>151</sup> Finally, other courts have rejected Chapter 13 plans that attempt to direct the servicer to apply post-petition maintenance payments as if there had been no delinquency.<sup>152</sup>

Recent legislative and regulatory developments clearly reflect the legal concept that a Chapter 13 debtor is **not** deemed completely current on a loan until he or she has made all maintenance and cure payments required under the confirmed Chapter 13 plan, undercutting any argument in favor of requiring application of payments pursuant to a specific amortization. Without limitation, the 2011 amendments to the Federal Rules of Bankruptcy Procedure require an itemized accounting only **after the debtor has made all required payments:**

“Notice of Final Cure Payment. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor’s counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim . . . .”<sup>153</sup>

At this point, the holder of the claim must file a response indicating: whether it agrees that the debtor has paid in full the amount required to cure the default on the claim; and

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<sup>149</sup> See the comment to the CFPB by the National Consumer Law Center (the “NCLC”) dated November 22, 2013, at footnote 19.

<sup>150</sup> For example, *In re Hudak*, 2008 WL 4850196 \*6 (Bankr. D. Colo. 2008) acknowledges that a loan is not contractually current at confirmation. (“The loan can only be determined to be ‘contractually current’ after, but not before, all prepetition arrearages have been paid . . . To deem a loan contractually current upon confirmation without qualifying language is premature and inconsistent with the Bankruptcy Code.”) On the other hand, *In re Collins*, 2007 WL 2116416\* 11 (Bankr. E.D. Tenn. 2007) required a servicer to “deem” the per-petition arrearage amount contractually current.

<sup>151</sup> Bankruptcy Rule 3002.1 became effective on November 1, 2011.

<sup>152</sup> *In re Duke*, 447 B.R. 365, 369 (Bankr. M.D. Ga. 2011) (disapproving a plan provision that would have required post-petition payments to be applied to the next post-petition payment due because the “security deed . . . controls the application of [post-petition] payments from Debtors.” “Because 11 U.S.C. § 1322(b)(2) prohibits Debtors from modifying the rights of Wells Fargo under the security deed, an attempt through the plan to alter the security deed provision regarding application of payments is prohibited.”) *In re Jackson*, 446 B.R. 608 (Bankr. N.D. Ga. 2011) (rejecting plan provision that would have required application of post-petition monthly payments to the next post-petition payment due because it would impose a duty on a servicer that neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure require). *In re Anderson*, 382 B.R. 496, 503 (Bankr. D. Or. (2008) (finding plan requirement to apply post-petition maintenance payments as if there was no pre-petition default “might pass muster” but requiring the payments to be applied as if the accounts were current would be an impermissible modification).

<sup>153</sup> Fed. R. Bankr. P. 3002.1(f).



whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Bankruptcy Code, itemizing the required cure or post-petition amounts, if any, that the holder contends remain unpaid.<sup>154</sup> If the parties disagree, the court is required, on the motion of the debtor or trustee and after notice and a hearing, to determine whether the debtor has cured the default and paid all required post-petition amounts.<sup>155</sup>

This rule reflects the reality, which the CFPB acknowledges, that less than half of Chapter 13 debtors make all payments under their plans.<sup>156</sup> Notably, neither Rule 3002.1 nor its Advisory Committee comments indicate the necessity of a breakdown of principal and interest, instead requiring only the total amount of the post-petition payment amount.<sup>157</sup>

The heavily negotiated National Mortgage Settlement (“NMS”) further evidences the proper approach to accounting for payments in Chapter 13 cases. Consistent with Bankruptcy Rule 3002.1(f), and given the substantial chance that the debtor will not make all payments required under the plan, the servicing standards under the NMS defer a formal accounting to the either the end of the case or termination of the automatic stay:

“In active chapter 13 cases, Servicer shall ensure that: . . . (c) as of the date of dismissal of a debtor’s bankruptcy case, entry of an order granting Servicer relief from the stay, or entry of an order granting the debtor a discharge, there is a reconciliation of payments received with respect to the debtor’s obligations during the case and appropriately update the Servicer’s systems of record. In connection with such reconciliation, Servicer shall reflect the waiver of any fee, expense or charge pursuant to paragraph III.B.1.c.i or III.B.1.d.”<sup>158</sup>

Consistent with the Bankruptcy Code and Bankruptcy Rules, the NMS Servicing Standards require servicers to promptly apply payments made on account of pre-petition arrearage amounts and post-petition payment amounts.<sup>159</sup> As with the Bankruptcy Code and Bankruptcy Rules, however, the NMS Servicing Standards do not dictate a continuous breakdown of principal and interest throughout the case, whether on a contractual basis, post-petition current basis, or otherwise. This approach properly reflects the legal concepts that: a) the debtor cannot be deemed completely current for

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<sup>154</sup> Fed. R. Bankr. P. 3002.1(g).

<sup>155</sup> Fed. R. Bank. P. 3002.1(h).

<sup>156</sup> See 79 Fed. Reg. 74176, 74206 (Dec. 15, 2014) at n. 120.

<sup>157</sup> Fed. R. Bankr. P. 3002.1 Advisory Committee’s Notes (2011) (“In order to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, see Rule 3001(c)(2), and the amount of the post-petition payment obligations.”)

<sup>158</sup> See Exhibit A to Consent Judgment, Section I.B.11, which can be found [here](#).

<sup>159</sup> See Exhibit A to Consent Judgment, Section I.B.11.

accounting purposes until the debtor successfully completes his or her plan; and b) if the debtor fails to complete all payments and the case is dismissed, the application of payments are to be made as if the bankruptcy case never occurred.<sup>160</sup>

Even the most recently proposed amendments to the Federal Rules of Bankruptcy Procedure and the related Model Chapter 13 Plan are silent on the manner of application of payments to principal and interest post-petition.<sup>161</sup> With the goal of creating greater uniformity in Chapter 13 practice, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) recommends mandatory use of a model plan.<sup>162</sup> The Model Chapter 13 Plan proposed by the Rules Committee contains no provisions directing a creditor to apply maintenance and cure payments to principal and interest *at all*, much less pursuant to a particular amortization schedule. Consistent with the current Bankruptcy Rules and the NMS Servicing Standards, the Model Chapter 13 Plan lists only a lump sum total installment payment to be made on a going-forward basis because this is the information consumers need.

*b. Chapter 13 Statements Should Focus on Plan Progress*

We understand that the CFPB believes that debtors may wish to use statements to track whether the servicer is applying payments properly. We do not dispute that a servicer should accurately communicate whether a debtor is current on post-petition payment obligations and the balance of the arrearage remaining on the servicer’s records. However, we object to any suggestion that mortgage payments on a debtor’s principal residence should not or cannot be applied contractually during a Chapter 13 case.

Consistent with Chapter 13’s anti-modification rule, many mortgage servicers apply payments pursuant to the underlying mortgage contract, while simultaneously tracking the post-petition “due for” date and amounts, and the balance of the pre-petition arrearage.

A debtor who timely pays the post-petition monthly payments and the arrearage set forth in an allowed proof of claim will emerge from Chapter 13 having cured the pre-petition default and will be contractually current as of the end of the Chapter 13 plan. Bankruptcy Rule 3002.1 includes detailed requirements for the servicer to provide the debtor with the information needed to maintain current payments throughout the Chapter 13 case.<sup>163</sup> Bankruptcy Rule 3002.1 also ensures that the debtor or the Chapter 13 trustee have an opportunity to challenge the servicer within the Chapter 13 case if the servicer has not

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<sup>160</sup> See 11 U.S.C. § 349(b); *Collier on Bankruptcy* 349.03[1].

<sup>161</sup> See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure, August 15, 2014, prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and available [here](#).

<sup>162</sup> See *id.* at p. 79.

<sup>163</sup> Fed. R. Bankr. P. 3002.1(b)-(d)

given timely and accurate notice of all payment changes, post-petition advances, and the status of the account to the debtor, the debtor’s attorney, and the Chapter 13 trustee.<sup>164</sup>

Even the National Consumer Law Center (the “NCLC”) acknowledges that the Bankruptcy Rule 3002.1 is “intended to give the borrower information needed to avoid further default and to emerge from bankruptcy without being surprised by undisclosed fees and payment amounts due.”<sup>165</sup> As a result of the adoption of Rule 3002.1, “courts nationally are able to ensure that debtors who successfully complete ‘cure and maintain’ Chapter 13 plans emerge from bankruptcy with either a fully current home mortgage or the knowledge of and ability to object to any claimed amounts due.”<sup>166</sup>

At the present time, there are more than 30 local bankruptcy court rules or forms that address how a servicer may permissibly inform a Chapter 13 borrower regarding the financial status of the Chapter 13 case. None of them require the servicer to apply payments received during a Chapter 13 case in a particular manner. Many of the rules allow the servicers to simply send the same statements that are sent to nondebtor customers.<sup>167</sup> There is no reason to believe that all of these local approaches are wrong, and that obligations not present in the Bankruptcy Code, nor deemed necessary by the courts that oversee compliance with Chapter 13, should be imposed.

Chapter 13 statements should focus on the financial information that is important to the debtors: what is the amount of the required post-petition maintenance payment and what is the balance of the pre-petition arrearage. Any proposed principal-interest breakdown would be irrelevant to whether the debtor is complying with the Chapter 13 plan, and inconsistent with the anti-modification provision of the Bankruptcy Code.

*c. Recommendations*

We recommend that Chapter 13 statements be permitted but not required to reflect principal-interest breakdowns. If a principal-interest breakdown is required for payments that have been made, the breakdown should be permitted to be contractual. If a breakdown is required for the next scheduled payment, it should be permitted to be the breakdown associated with the month that the payment will be due based on the

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<sup>164</sup> Fed. R. Bankr. P. 3002.1(e), (g)-(i).

<sup>165</sup> Comment by the NCLC to the CFPB dated November 22, 2013, page 7.

<sup>166</sup> *In re Thongta*, 480 B.R. 317, 319 (Bankr. E.D. Wis. 2012) (cited in NCLC Comment footnote 22).

<sup>167</sup> *See, e.g.*, LBR 4001–2(a)(4), Bankr. M.D. Ala.; LBR 4001–4(a)(1), Bankr. D. Colo.; LBR 4001–5, Bankr. D. Md.; LBR 4001-3(a), D. Mass (as long as statements do not demand payment or threaten foreclosure or dismissal); LBR 3021.F, E.D. Mo. (permitting statements to reflect post-petition obligations), and LBR 3021.G, E.D. Mo. (requiring payments that accrue post-petition to be applied “to post-petition monthly contractual mortgage obligations . . . pursuant to applicable non-bankruptcy law”); LBR 4001-4, W.D. Mo (statements creditors send “in the ordinary course of business” permitted as long as statements do not demand payment); LBR 4001-2(a), E.D. N.C; LBR 4001-1(e)(1), W.D. N.C (non-bankruptcy statements required if there are direct payments to the creditor); and LBR 4001-1(a)(1), D. R.I.

amortization schedule under the applicable loan contract. If a breakdown is required in the Past Payments Breakdown box, it should reflect the contractual application of all payments received in the previous billing cycle.

As proposed, Sample Forms H-10(E) and (F) includes a box entitled “Past Payments Breakdown” and “Post-Petition Payments Breakdown,” respectively. We believe the title is a misnomer. The proposal defines pre-petition payments as those to cure pre-petition defaults, and defines post-petition payments as those that satisfy loan payments that become due post-petition.<sup>168</sup> If servicers will be required to reflect payments broken down into principal and interest, it would be critical for § 1026.41(f)(3)(iv) to allow servicers to reflect all “payments received” rather than just “post-petition payments received” in the Post-Petition Payments Breakdown. Servicers would need to show how all payments received are applied according to the contract in this box.

## ***2. Different or Separate Statements to Co-Borrowers Should Not Be Required***

The CFPB does not propose to amend comment 41(a), which provides that when there are two consumers with primary liability on the loan, “the periodic statement may be sent to either of them.” Proposed comment 41(f)(4)-1 would provide the same. This is consistent with the general requirement that Regulation Z loan origination disclosures be made to one consumer only.<sup>169</sup> Regulation Z does not require statements to include a borrower’s name and address, but statements must, to enable mailing and so the statement will identify the borrower and the property.

Proposed commentary would provide as follows when there are two co-borrowers but only one files a bankruptcy petition:

- If no statement is required for the borrower who filed for bankruptcy, the servicer would need to comply with the statement requirement “with respect to the other” borrower.<sup>170</sup> “In this circumstance, the servicer would be required to provide regular periodic statements, without any of the modifications set forth in § 1026.41(f), to the spouse not in bankruptcy.”<sup>171</sup>

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<sup>168</sup> Proposed comment 41(f)(3)-2.

<sup>169</sup> Regulation Z provides:

“If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the account.” 12 C.F.R. § 1026.5(d) (open-end credit).

“If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the obligation.” 12 C.F.R. § 1026.19(d) (closed-end loans).

<sup>170</sup> Proposed comments 41(e)(5)(i)-1 and 41(f)(4)-1.

<sup>171</sup> Proposed comment 41(f)(4)-1.

- If a modified statement is required for the borrower who filed for bankruptcy, the servicer could send the modified statement to either co-borrower,<sup>172</sup> and non-bankruptcy statements would not be required.<sup>173</sup>

The proposal to switch the borrowers who receive statements on the same loan would have a number of unintended consequences. It would mean servicers would need to devise a way to remove a name from an account without impacting other loan administration, including notices. The majority of servicers use technology that does not permit removing a co-borrower's name. The technological limitations against removing a name is by design. Building systems that allow a co-borrower's name to be removed would expose borrowers to harm and servicers to serious issues if removing a name were to cause a co-borrower not to receive a required notice or communication. For example, virtually every co-borrower is entitled to numerous notifications under state foreclosure laws, even co-borrowers who surrendered their interest in the property and received a discharge of personal liability for the mortgage debt.

Similarly, servicers are required to send borrowers IRS 1098 Forms (mortgage interest statement). The IRS requires servicers to have one, and only one, "payer of record" designated for each loan. If a subsequent purchaser assumes the loan but the prior owner is not released and remains a borrower, the IRS requires the servicer to designate the successor as the payer of record. The IRS does not permit the servicer to remove that successor from the account even if the successor were to file for bankruptcy, and does not permit the servicer to designate the prior owner as the payer of record.<sup>174</sup>

If statements are not required for one borrower who filed for bankruptcy but are required for a co-borrower, and they both share the same mailing address, it is not clear what it means to comply with the statement requirement "with respect to" only one borrower, because either could open the mail. If the statements are electronic, either could view them online at any time, even if the borrowers do not share the same physical address.

To address what we believe are unintended consequences associated with the current proposal, we recommend:

- If statements are not required for the bankruptcy debtor, they should not be required for a co-borrower who did not file for bankruptcy. Any other requirement would seriously disrupt servicers' ability to comply with numerous state and federal laws requiring disclosures to the bankruptcy debtor.
- When statements are required, it should not matter whether they include one or all borrowers' names. Borrower names are neither required nor prohibited on statements, so there should be no reason to remove a name.

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<sup>172</sup> Proposed comments 41(e)(5)(i)-1 and 41(f)(4)-1.

<sup>173</sup> Proposed comment 41(f)(4)-1.

<sup>174</sup> See *IRS Instructions for Form 1098*, p. 2 (2015).

- Servicers should not be required to send statements if there could be a risk of violating the automatic stay or discharge injunction.
- In the event that two co-borrowers file separate bankruptcy cases, no more than one statement should be required. If one borrower filed under Chapter 7 and the other under Chapter 12 or 13, the statement should be a Chapter 7 statement.

### **3. *Time Needed to Produce Statements***

#### **a. *Switching and Resuming Statements May Require Manual Adjustments***

When bankruptcy statements are required, they must contain different information and disclosures from non-bankruptcy statements. The proposal would require statements for a loan to switch from non-bankruptcy to bankruptcy statements, and from bankruptcy back to non-bankruptcy statements, in some circumstances. Statements may be required throughout a bankruptcy, they may cease, or they may cease then resume. The statements required upon resumption could be either non-bankruptcy statements, in the event the bankruptcy terminates, or could be modified bankruptcy statements, in the event a consumer decides to opt in to receiving bankruptcy statements or has discharged liability.

Outside of bankruptcy, periodic statements are generally required within 4 days of the close of a courtesy period.<sup>175</sup> Outside of bankruptcy, if a servicer sends coupon books, the servicer knows in advance and has time to get the books printed before the deadline.

Switching to or from bankruptcy statements or coupon books, or resuming them after a hiatus, is more complicated, but the proposal would not alter the normal statement timing requirement. The proposal addresses statement timing only for resumption after a hiatus, which it would require “within a reasonably prompt time” after the next payment due date that follows termination of the statement exemption.<sup>176</sup> The same as with statements outside of bankruptcy, the proposal would provide that four days after the next payment due date, or “within four days” of the close of the next courtesy period, would generally be reasonably prompt.<sup>177</sup> The same time limit would apply when the servicer provides coupon books instead of statements, after a hiatus. Servicers cannot reasonably switch

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<sup>175</sup> The regulation and commentary provide:

“The periodic statement must be delivered or placed in the mail within a reasonably prompt time after the payment due date or the end of any courtesy period provided for the previous billing cycle.” 12 C.F.R. § 1026.41(b).

“Delivering, emailing or placing the periodic statement in the mail within four days of the close of the courtesy period of the previous billing cycle generally would be considered reasonably prompt.” Comment 41(b)-1.

<sup>176</sup> Proposed 12 C.F.R. § 1026.41(e)(5)(ii).

<sup>177</sup> Proposed comment 41(e)(5)(ii)-2.

statement types, or resume statements or coupon books, for loans subject to bankruptcy within the proposed timeframe.

The borrower may file a bankruptcy petition, or a bankruptcy statement exemption may terminate, at any time. It is unlikely that the servicer will receive advance notice of these events. This can lead to potentially insufficient time for the servicer to make appropriate adjustments in the proposed time frame. For example, if a servicer were to learn on the 31st that a statement type must switch or that an exemption terminated, the proposal would require a statement by the 19th. Unlike statements outside of any bankruptcy, however, the servicer may need to make substantial manual adjustments to the information to be included in a statement before beginning the process of producing the statement. When a Chapter 13 bankruptcy case is dismissed, for example, the servicer will need to adjust the account to reflect the dismissal pursuant to, without limitation, § 349(b) of the Bankruptcy Code.

These cases can require complicated, fact-specific adjustments that servicers cannot completely automate. To provide the required time to undertake careful audits and adjustments, servicers should be allowed a longer period of time to switch statements types than the period currently being proposed.

For these reasons, we request that when switching from a bankruptcy to a non-bankruptcy statement or *vice versa*, or when resuming statements, servicers have a reasonably prompt time after the *second* payment due date that occurs after the servicer learns of the revised statement requirement.

*b. Extra Time May Be Needed After a Servicing Transfer*

Proposed § 1024.41(k) would allow extra time in processing a loss mitigation application in the event of a servicing transfer while an application is pending. Allowing additional time to incorporate bankruptcy-related amendments is similarly warranted. As the CFPB recognizes, servicing transfers can involve complicated coordination and manual processing. Bankruptcy can further complicate a transfer of the servicing for that loan, especially if an event that triggers a switch to or from bankruptcy statements occurs near the time of a servicing transfer.

Unlike loss mitigation applications, periodic statements are tied to a statement cycle. Statements must reflect events that occurred during an entire statement cycle, such that statements cannot be prepared as of a mid-cycle date.

Also unlike loss mitigation applications, a short delay in amending a bankruptcy statement does not adversely affect a consumer's rights, and does not affect the timing of a foreclosure.

For these reasons, we suggest that when servicing transfers after an event triggers a switch to or from bankruptcy statements, or after a bankruptcy event alters the payment amounts required to be reflected in statements, that the transferee servicer have a reasonably prompt time after the second payment due date that occurs after the transfer, before the new statement requirement becomes effective.

C. WHEN STATEMENTS SHOULD BE REQUIRED AND TO WHOM

*1. Statements Should Be Based on the Content of the Debtor's File Pending Confirmation*

The Regulation Z bankruptcy test provides that statements are not required when two prongs of a bankruptcy test are met. We request clarification that the proposal does not intend to distinguish between bankruptcy chapters with respect to debtors who have decided not to continue to make mortgage payments. Instead, we believe that statements should not be required in Chapters 11, 12, and 13 based on the plans and other documents filed by the debtor, as is the case for Chapter 7.

The CFPB describes its proposal as not requiring statements for such debtors:

“The Bureau is proposing to limit the scope of the exemption in § 1026.41(e)(5) to consumers in bankruptcy who have made a determination to surrender the property or avoid the lien securing the mortgage loan . . . .”<sup>178</sup>

We agree with the CFPB that statements to consumers in this circumstance would not provide meaningful information and may be inconsistent with bankruptcy law. The same is true regardless of which bankruptcy chapter protects the debtor. We walk through the language of the proposed regulation to illustrate our uncertainty.

The proposal clearly would not require statements for Chapter 7 debtors who file an intent to surrender the property. In this case, the first prong is met because the consumer is a debtor in a bankruptcy case.<sup>179</sup> The second prong is met because the debtor filed “a Statement of Intention pursuant to 11 U.S.C. § 521(a) identifying an intent to surrender the dwelling[.]”<sup>180</sup>

A Chapter 13 debtor would similarly meet the first prong. A Chapter 13 debtor who decides not to continue making mortgage payments does not file a § 521(a) Statement of Intention, but rather will file a plan that states that the property will be surrendered, a subordinate lien will be stripped, or the mortgage obligation will not be addressed in the plan. Plans of this nature do not include provisions to repay the pre-petition delinquency

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<sup>178</sup> 79 Fed. Reg. 74176, 74251 (December 15, 2014).

<sup>179</sup> Proposed § 1026.41(e)(5)(i)(A).

<sup>180</sup> Proposed § 1026.41(e)(5)(i)(B)(4).



or to make post-petition payments. However, unlike Chapter 7, under the proposal, this debtor apparently would not satisfy the second prong until the proposed plan is confirmed, which may be several months or even a year after the bankruptcy filing. We believe that a more consistent approach would be for the second prong to be satisfied when a plan that does not propose to pay the pre-petition arrearage or make post-petition payments, including based on a surrender or lien avoidance provision, be treated with the same significance as a § 521(a) Statement of Intention. Because the debtor has clearly stated an intention not to make payments, periodic statements should not be required. Similarly, statement should not be required if a debtor files a motion or adversary proceeding to avoid a lien.

We agree with the CFPB's discussion in its section-by-section analysis of the proposed regulation that debtors who intend to surrender property or avoid a lien do not generally need continuing information every month:

“[B]ankruptcy courts have determined that periodic statements can constitute impermissible collection attempts in violation of the automatic stay when a consumer has indicated an intent to surrender the property, either through the Statement of Intention in a Chapter 7 case or a plan of reorganization in a Chapter 13 case. Similarly, courts have held that a Chapter 13 consumer with a plan of reorganization that provides for ‘avoiding’ a junior lien—that is, rendering the lien unenforceable and treating the mortgage debt as an unsecured claim—has no need for statements regarding the amounts due under the mortgage loan. . . . [P]roposed § 1026.41(e)(5) limits the scope of the exemption to those consumers who no longer need the information in the periodic statement. . . . As commenters noted, in each of these situations, a consumer is no longer retaining the property, is no longer making regular periodic payments on the mortgage loan, or has affirmatively requested not to receive statements or coupon books. As a result, the Bureau believes that the statement’s value is diminished and may be outweighed by a correspondingly increased risk of a court finding that a servicer violated the automatic stay by sending periodic statements or coupon books in this circumstance.”<sup>181</sup>

We recommend revising the second prong in proposed § 1026.41(e)(5)(B) as follows:

(2) The consumer’s **most recent filed confirmed** plan of reorganization **under the applicable provisions of Chapter 11, Chapter 12 or Chapter 13 of the Bankruptcy Code** provides that the consumer will surrender the dwelling securing the mortgage loan; **or** provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;

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<sup>181</sup> 79 Fed. Reg. 74176, 74251-52 (December 15, 2014) (footnotes omitted).

## **2. *Opt-Outs Should Not Be Required Twice***

The proposed rule would permit consumers to opt out of receiving statements, which we strongly support. There is no reason to require servicers to send statements that the consumers consider a nuisance, or impermissible debt collection, and which they will not read or use. This is especially important given that consumers can request any account information at any time under § 1024.36.

We do request an implementation clarification that would grandfather opt-out elections that predate a final regulation. Some bankruptcy-protected consumers have already opted out of receiving statements. Servicers may have provided an ability to opt out of statements before § 1026.41 became effective or after the interim final rule made clear that statements would not be required for bankruptcy-protected consumers. When a revised final regulation becomes effective in the present rulemaking, these consumers should not have to go through the process of opting out again, for what will appear to them to be no reason. Proposed comment 41(e)(5)(11)-1 provides:

“A servicer must comply with a consumer’s most recent written request to cease or to continue, as applicable, providing periodic statements or coupon books.”

We recommend that opt-outs should be permissible based on the “most recent request” under this language, even if the most recent opt-out request was before a new regulation becomes final and effective, and even if the request was made orally to the servicer rather than in writing.

## **3. *Statements Should Remain Permissible in Chapter 7 Ride-Throughs***

When statements are not required and the consumer does not opt in to receiving them, we request confirmation that sending them would not be a Regulation Z violation. For example, a debtor whose mortgage loan was discharged may prefer to continue to make payments to retain the property. In this instance, Regulation Z should not prohibit the servicer from sending statements. Sending statements after a discharge may risk a violation of bankruptcy law, but should not subject the servicer to TILA liability. The CFPB states in the section-by-section analysis:

“[T]he Bureau believes that consumers who continue making payments after discharging a mortgage loan should not be denied periodic statements or coupon books. The Bureau therefore declines to follow the suggestion that periodic statements or coupon books be conditioned on a consumer reaffirming the mortgage loan.”<sup>182</sup>

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<sup>182</sup> 79 Fed. Reg. 74176, 74249 (December 15, 2014).

We request an affirmative statement to this effect in the regulation itself to avoid TILA litigation over whether statements were sent impermissibly.

#### **4. *Cram-Downs Should Not Require Statements***

We recommend that a final regulation recognize cram-down plans under Chapters 11, 12, and 13, even though they are rare for mortgage loans secured by the borrower's principal residence. In essence, cram-down is obtaining confirmation of a plan that modifies one or more terms of a loan, which may include the interest rate and the amount of the mortgage loan that must be treated as a secured claim, possibly rendering some or all of the mortgage debt unsecured. In the context of the borrower's principal residence, cram-down typically is available under Chapter 13 only when the loan will mature during the case, or when the note is secured by collateral in addition to the mortgaged property.

We suggest that statements not be required with respect to loans on which a cram down is allowed because the terms of each unique cram down may not be susceptible to description within an automated periodic statement. In some jurisdictions, a cram down is not binding until the debtor completes the plan. If any statements are required, they should be limited to only the information the servicer can provide automatically, such as (i) the amount of the payments received during the most recent statement cycle and (ii) the amount of the next monthly payment.

Servicers cannot routinely produce monthly statements manually. It would be disproportionately costly to require servicers to automate a complicated statement for a very small number of cram down cases, where the treatment can vary by jurisdiction.

#### **5. *We Strongly Support Not Requiring Statements for Bankruptcy Trustees***

We strongly support the proposal not to require servicers to send statements to bankruptcy trustees. We take this opportunity to put the issue into perspective.

First, trustees have access to all information needed to perform their statutory duties. Any concerns the trustees may have regarding the servicers' receipt and processing of payments are adequately addressed pursuant to the notice of final cure payment that the trustee or debtor files at the end of the case pursuant to Bankruptcy Rule 3002.1(f). While we understand that receiving statements could be convenient to some trustees with respect to certain individual cases, trustees have not indicated any compelling need for the information in every month in every case.

Second, it would be disproportionately costly for servicers to provide statements to trustees. Some trustees have stated that because the information is available to servicers, "establishing an obligation to provide such information in a Chapter 13 case is

feasible.”<sup>183</sup> This position ignores the cost. Another stated that requiring servicers to send statements to trustees would result in early detection of payment application errors “so the problem can be cured at minimal cost to the debtor and the servicer.”<sup>184</sup> This also ignores the cost of providing statements, as well as the tools already in place to address this concern.

The cost of implementing the systems changes that would be required to mail one statement to two addresses would run into the millions of dollars. Consumer mortgage servicers, and financial services providers generally, routinely send statements and disclosures only to one address per account, even if there are multiple account holders for the same account. Sending bankruptcy statements to both consumers and trustees would require significant systems redesign, a costly process that requires extensive, and highly skilled, labor.

In addition, servicers do not have trustees’ mailing information stored in the technology systems that produce monthly statements. Even if it were stored, the systems may not be able to automate producing and sending statements to trustees. Servicers would need to reprogram their systems to store each address, retrieve it in a file, then produce a duplicate statement with a different addressee. Servicers would incur the cost of coordinating with a print vendor to read and print the statements and the cost of mailing a duplicate statement and performing due diligence and return mail reconciliation. This would be another costly reprogramming process, and it would require continuous updating.

Some trustees have suggested that servicers should only be required to deliver statements to trustees upon trustee request.<sup>185</sup> However, retooling systems to provide statements to a second address upon request, intermittently, could be just as costly as providing them on a wholesale basis to all trustees in all circumstances. The resources involved in tracking which trustee requests which statements when would be disproportionately costly.

Trustees are able to perform their duties without the need to impose multi-million dollar requirements on servicers.

Third, trustees have suggested no reason why they cannot simply request statements from debtors. Doing so would not cost millions of dollars. Doing so would also enable consumers to control disclosure and limit breaches of their sensitive information.

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<sup>183</sup> National Association of Chapter Thirteen Trustees (“NACTT”) letter to the CFPB, May 9, 2014.

<sup>184</sup> Henry Hildebrand comment on behalf of NACTT to CFPB, posted November 26, 2013.

<sup>185</sup> NACTT letter to the CFPB, May 9, 2014.

**6. *Consumer Testing Should Be Complete and Incorporated Before Statements Are Implemented***

The CFPB intends to conduct consumer testing on a proposed sample statement for Chapter 13 consumers and will test whether consumers are confused by any discrepancy between the allocation in the amount due and the allocation in the past payment breakdown.<sup>186</sup> We support testing the forms.<sup>187</sup>

The day the CFPB releases its final regulation, servicers will immediately begin implementing it. If the CFPB were to complete some part of its testing after that time, or were to revise the statements, the regulation, or the commentary after that time as a result of the testing, implementation would need to start again. This would be an unnecessary waste of scarce implementation resources.

We strongly urge the CFPB to test the forms and make all the resulting revisions *before* the regulation is final so implementation is only necessary once.

**D. CONTENT OF BANKRUPTCY STATEMENTS**

**1. *Chapter 12 and 13 Statements Should Be Amended Before Plan Confirmation***

We request clarity about the proposed definition of pre- or post-petition payments. Proposed (f)(3) uses the terms but does not define them. Proposed comment 41(f)(3)-2 defines them as follows (emphasis added):

“For purposes of § 1026.41(f)(3), pre-petition payments are payments **made under a plan of reorganization** to cure the consumer’s pre-bankruptcy defaults, if any. Post-petition payments are payments **made under a plan of reorganization** to satisfy the mortgage loan’s periodic payments as they come due after the bankruptcy case is filed. For example, assume a consumer has \$3,600 in arrears as of the bankruptcy filing date with respect to a mortgage loan requiring monthly periodic payments of \$2,000. The consumer’s plan of reorganization requires the consumer to make payments of \$100 each month for 36 months to pay the pre-bankruptcy arrearage, and \$2,000 each month to satisfy the [post-petition] monthly periodic payments. In this example, the \$100 payments are the pre-petition payments and the \$2,000 payments are the post-petition payments.”

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<sup>186</sup> 79 Fed. Reg. 74176, 74177 (December 15, 2014).

<sup>187</sup> The CFPB may prescribe model disclosure forms. Dodd-Frank Act § 1032(B)(1), 12 U.S.C. § 5532(b)(1). “Any model form issued pursuant to this subsection shall be validated through consumer testing.” Dodd-Frank Act § 1032(b)(3), 12 U.S.C. § 5532(b)(3).

The proposed definition of a plan of reorganization is limited to a confirmed plan.<sup>188</sup> We are concerned that this definition is faulty and could mean that, under proposed comment 41(f)(3)-2, servicers have no guidance on the form and content of periodic statements during the gap period between the bankruptcy filing and plan confirmation. We do not believe this was the intent. We believe the intent was to require statements to include the best information reasonably available to servicers, as follows for Chapter 12 and 13 cases:

Upon Bankruptcy Filing. Immediately upon a bankruptcy filing, statements will need to continue to reflect payments that become due post-filing according to the loan contract. At this early stage, the servicer may not yet know the pre- or post-petition payment amounts, so these should not be required in statements. At this stage, statements can include bankruptcy disclaimers, but statements should not be required to include the amount of a pre-petition arrearage. If the servicer is able to estimate either the pre-petition arrearage or the post-petition monthly payment amount, it should be permissible to include this information, but not required.

Upon Filing a Proof of Claim. After a bankruptcy filing, a servicer files a proof of claim. The deadline for filing is generally 90 days after the first scheduled date for the § 341 Meeting of Creditors (or approximately 120 days from the bankruptcy filing date),<sup>189</sup> proposed to be shortened to 60 days from the bankruptcy petition date.<sup>190</sup> If the loan has an escrow, the servicer's filing will include an escrow statement run as of the date the petition was filed.<sup>191</sup> This statement may change the post-petition payment amount immediately after the statement is filed. The proof of claim itself does not legally change the amount the debtor must pay for post-petition payments, but it is *prima facie* evidence of the amount of the claim.<sup>192</sup>

The proof of claim is significant to statements because when servicers file a proof of claim in a Chapter 13 case, they know what they believe to be the correct amount of the pre-petition arrearage, subject to an adverse ruling on a claim objection. Within a reasonable amount of time after the filing the proof of claim, servicers can include the amount of the arrearage and the post-petition monthly payment amount listed in the filed proof of claim in periodic statements. We recommend that statements be required to indicate post-petition payment amounts and the total pre-petition arrearage, only a reasonable amount of time after the servicer files its proof of claim, whether or not the plan has been confirmed.

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<sup>188</sup> Proposed comment 41(f)(3)-1.

<sup>189</sup> Fed. R. Bankr. P. 3002(c).

<sup>190</sup> [Proposed amendments](#) to Fed. R. Bankr. P. 3002(c).

<sup>191</sup> Fed. R. Bankr. P. 3001(c)(2)(C).

<sup>192</sup> Fed. R. Bankr. P. 3001(f).

After filing the proof of claim, servicers should have until a reasonable time after the second payment cycle to incorporate all the changes. It should be permissible, but not required, for servicers to include the post-petition payment amounts and pre-petition arrearage amount prior to filing the proof of claim, if that information is available to the servicer.

A consumer may dispute the amount of a pre-petition arrearage and possibly the post-petition payment. However, the servicer should be permitted to base payment information in statements on the proof of claim or its internal calculation of those amounts until a reasonably prompt time after the second billing cycle after a court order revises the amounts. Bankruptcy courts are the appropriate venue for disputes over bankruptcy claims, not monthly servicers' statements.

Payment Changes. Some bankruptcy events can trigger the need for an amendment to the required payment amounts. These should be incorporated into the statement issued on the later of the next billing cycle or 30 calendar days after filing a Rule 3002.1(b) Notice of Payment Change.

Court orders, such as an agreed order disposing of a motion for relief from stay, may change the required payment temporarily. Servicers may arrange with consumers to handle a post-petition missed payment with an agreed order. Confirmation orders or orders granting a motion to modify the plan may also result in payment changes. In these cases, services should be able to reflect the changed payment amount in the statement issued on the later of the next billing cycle or 30 calendar days after the relevant order becomes final.

Plan Confirmation Alone Does Not Trigger Payment Changes. Confirmation of a plan sometimes does not occur until many months into a bankruptcy. Consequently, it should be permissible to replace non-bankruptcy statements with bankruptcy statements before confirmation.

## ***2. Statements Can Only Reflect Payments the Servicer Received***

Proposed § 1026.41(f)(3)(iv) and (v) would require showing transaction activity, including only payments the servicer received, as opposed to payments the trustee received. We support this. Servicers do not have the ability to require trustees to remit payments as soon as trustees receive them.

We also support the proposal not to require servicers to track and indicate whether the consumer or the trustee made a payment to the servicer. We are therefore pleased that the proposal would not require servicers to incur the cost of systems changes for loans in bankruptcy to report who made a payment. It would be inappropriate to require servicers to incur costs to report this known information back to consumers.

### 3. *A Statement to Contact the Attorney or Trustee Is Appropriate*

Proposed § 1026.41(f)(3)(vii)(D) would require a statement directing consumers to call their attorneys or trustees with payment application questions. This is appropriate because servicers do not have sufficient information to answer these questions.

### 4. *Debt Collection and Overdue Payments*

Proposed § 1026.41(f)(3)(1)(i), (ii), and (iii) allow flexibility in how to reflect a post-petition payment amount, which we support. Proposed § 1026.41(f)(3)(ii) says the payment amount “may be limited to the date and amount of the post-petition payments due and any post-petition fees and charges imposed by the servicer.” Proposed § 1026.41(f)(3)(iii) says the explanation of amount due “may be limited to the post-petition payments and any post-petition fees and charges imposed by the servicer.”

Likewise, the section-by-section analysis states:

“[T]he Bureau understands that some local rules adopted by bankruptcy courts that address periodic statements provide that the statements should reflect the post-petition payments, and that these local rules would not require a servicer to include pre-petition payments or amounts due under a court order in the amount due field. Accordingly, proposed § 1026.41(f)(2)(ii) and (iii) require a servicer to include post-petition payments in the amount due and explanation of amount due, including any past due post-petition payments, but do not require a servicer to include pre-petition payments that may be due under the plan of reorganization.”<sup>193</sup>

However, we are concerned because some courts may view this approach as using the statement as a collection tool. Consistent with the section-by-section analysis quoted immediately above, the proposed Model Form H-30(E) not only identifies the overdue post-petition payments in the Explanation of Payment Amount box, but it includes the overdue payment in bold at the top of the statement in the “**Payment Amount.**”

We believe many courts would conclude that a statement listing an amount other than the current month’s payment amount as the Payment Amount due is a violation of the automatic stay. While we agree that the current month’s payment amount may include amounts that are set forth in agreed orders in addition to the regular principal, interest, escrow, and advances that are due that month, we question whether servicers should be required to include overdue payments in the “Payment Amount” section at the top of the statement. Without limitation, bankruptcy courts have held that while a borrower is in bankruptcy, a creditor may not use a monthly statement to collect anything more than the

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<sup>193</sup> 79 Fed. Reg. 74176, 74262 (December 15, 2014).



current payments.<sup>194</sup> The traditional approach is to pursue a motion for relief from the stay when a debtor falls behind in a Chapter 13 case, rather than listing the overdue amount as part of the amount due in a Chapter 13 bankruptcy statement.

We do not object to reflecting the amount of overdue payments in an Explanation of Payment Amount box, but we support allowing servicers not to include overdue payments in the monthly “Payment Amount” at the top of the statement.

We also support expressly affording servicers leeway to revise the terminology and layout on the model form should they chose to do so. For example, some servicers might prefer to include a box on the left side of the statement with the “Explanation of Current Monthly Post-Petition Payment Amount” box limited to the amount due in the next payment. These servicers would prefer to provide separately an “Explanation of Post-Petition Amounts Outstanding” on the right side of the statement in a clear but less prominent manner. The “Explanation of Post-Petition Amounts Outstanding” box would include the “Prior Post-Petition Monthly Payments Outstanding” which are identified as “Unpaid past payments” on Sample Form H-30(E). We support informing consumers about their payment history, but not in a manner that appears to be an attempt to collect outside of the bankruptcy procedures.

We request confirmation that the Payment Amount at the top of the Chapter 13 statement may be limited to only the current monthly post-petition payment amount, and not include overdue payments of any kind. We also request explicit authorization for services to vary the language, format, and layout of the Chapter 13 statements as long as the required information is provided to the borrowers, and without losing the statutory safe harbor for use of the CFPB’s Model Forms.<sup>195</sup>

#### **6. *Plan-to-Date Arrearages Are More Helpful than Year-to-Date Arrearages***

The proposed regulation would require Chapter 13 statements to reflect in the Pre-Petition Arrearage Payment box the year-to-date payments received on the pre-petition arrearage.<sup>196</sup> We suggest that pre-petition information should reflect the “total pre-petition claim amount,” “total pre-petition amount paid to date,” and “pre-petition remaining balance” as of the date of the statement, and eliminate the “pre-petition amount paid last month” and “year to date” payments. This information is more useful to the borrower.

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<sup>194</sup> See *In re Henry*, 266 B.R. 457, 472 (Bankr. C.D. Cal. 2001) (“the creditor may not use a monthly statement to collect anything more than current payments”); *In re Draper*, 237 B.R. 502, 505 (M.D. Fla. 1999) (automatic stay is designed to stop all harassment and collection efforts by creditors).

<sup>195</sup> TILA § 105(b) and Dodd-Frank § 1032(d) provide a safe harbor for use of CFPB Model Forms.

<sup>196</sup> Proposed § 1026.41(f)(3)(vi)(B).

## **7. *Coordination With Bankruptcy Law***

In the event that a bankruptcy law, local rule, or court order requires information or statements differently from the CFPB's regulation, we request confirmation that compliance with the bankruptcy requirements would not be a Regulation Z violation.

We also request clarification that servicers have flexibility to adjust information they receive from trustees or through the National Data Center as appropriate. Servicers may need to figure out the proper treatment of some payments through trustees if the treatment is not readily apparent. We request clarification that servicers can make necessary adjustments without risking Regulation Z liability.

## V. DEFAULT and LOSS MITIGATION

### A. SENIOR LIENHOLDER FORECLOSURE

The CFPB proposes to permit a servicer to initiate foreclosure without the 120-day pre-foreclosure review, when the servicer joins a foreclosure by a senior lienholder. This is extremely helpful, and we strongly support it.

### B. PROPOSED DEFINITION OF DELINQUENCY

The CFPB proposes to define delinquency in Regulation X as follows:

*“Delinquency means a period of time during which a borrower and a borrower’s mortgage loan obligation are delinquent. A borrower and a borrower’s mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow became due and unpaid, until such time as the outstanding payment is made.”*<sup>197</sup>

#### 1. *Nonpayment Defaults*

The CFPB proposes to define delinquency in Regulation X to begin on the date a periodic payment sufficient to cover principal, interest, and escrow becomes due and is unpaid.<sup>198</sup> Regulation X does not currently define the term. The CFPB also proposes to amend Regulation Z regarding the content of periodic statements for delinquent loans. Currently, statements must indicate the date on which a consumer became delinquent.<sup>199</sup> This would be revised to require statements to reflect the length of the delinquency, as of the statement date.

The CFPB does not propose to amend § 1024.41(f)(1)(i), which prohibits foreclosure initiation before a loan is 120 days delinquent. We request an explicit statement that servicers may initiate and conduct a foreclosure in the event of a default that does not involve a delinquency, such as property waste, without waiting 120 days after accelerating the loan.

Proposed comment 1024.39(a)-6<sup>200</sup> appears to use the terms “delinquent” and “default” interchangeably. We request that the CFPB reference here only a payment “delinquency.”

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<sup>197</sup> Proposed § 1024.31.

<sup>198</sup> Proposed § 1024.31.

<sup>199</sup> 12 C.F.R. § 1026.41(d)(8)(i).

<sup>200</sup> The proposed comment provides:

*“Compliance with § 1024.41. A servicer complies with § 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact if the servicer has established and is maintaining ongoing contact with the borrower with regard to the borrower’s completion of a loss mitigation application or the servicer’s evaluation of the borrower’s complete loss mitigation application, or if the*

## 2. *Advances Are Irrelevant*

Proposed comment 31 provides (emphasis added):

*“Payment tolerance. For any given billing cycle for which a borrower’s payment is less than the periodic payment due, a servicer that elects to advance the missing funds to the borrower’s mortgage loan account may elect not to treat the borrower as delinquent. If a servicer chooses not to treat a borrower as delinquent for purposes of any section of subpart C, that borrower is not delinquent as defined in section 1024.31.”*

We suggest deleting the language “that elects to advance the missing funds to the borrower’s mortgage loan account” from the definition because it is unnecessary and confusing. Servicers may not advance funds to accept a short payment. The significant fact is that the servicer elects to ignore a delinquency, not how the servicer does so or what actions the servicer must document when making the election.

### C. ACCELERATED AND CHARGED-OFF LOANS

#### 1. *Accelerated Loans Are Difficult to Reflect Precisely*

Regulation Z currently requires statements to include, for delinquent loans, the amount needed to bring the account current.<sup>201</sup> For accelerated loans on which the servicer will accept a reinstatement amount, proposed commentary would require periodic statements to reflect both the accelerated and the reinstatement amount.<sup>202</sup>

Although the CFPB does not define acceleration, we are concerned that the CFPB may be suggesting that servicers provide a payoff amount in a periodic statement. Payoff statements are difficult to produce because the amount required to pay off a loan can change daily. Periodic statements are not payoff statements and are not designed to calculate all amounts due on the loan as in payoff statements. They do not reflect interest on a per diem basis because that would require capturing all the investor pay-off rules, or capturing daily changes to escrow or other corporate advances. Converting a billing file to a payoff statement would require significant system programming and costs. At the same time, consumers do not need that much precision about payoff amounts in periodic statements.

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servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation options. However, the servicer must resume compliance with the requirements of § 1024.39(a) for a borrower who cures a prior *default* but becomes *delinquent* again.” (Emphasis added.)

<sup>201</sup> 12 C.F.R. § 1026.41(d)(8)(vi).

<sup>202</sup> Proposed comment 41(d)(2)-1.

We request that servicers not be required to include the accelerated amount in periodic statements. If an accelerated amount is required, the CFPB should clarify that the amount can be an estimate.

Servicers should be allowed to include a disclaimer that consumers may not rely on the periodic statement as a payoff quote, and to include other appropriate disclaimers about the nature of a billing statement, and how to obtain a payoff quote.

## ***2. Statements for Charged-Off Loans May Need Bankruptcy Language***

Proposed § 1026.41(e)(6) would permit servicers to cease sending statements if the servicer charges off the loan and ceases accruing interest or charging additional fees. In this case, the servicer would need to provide a final statement explaining: the charge-off; that the lien remains in place and that the consumer remains liable for the loan; that the consumer may be required to repay the loan; and that the loan may be transferred.

We suggest permitting servicers to amend the final statement about continuing liability on the debt if the debt has been discharged in bankruptcy.

If the FDCPA applies and servicers are required to honor cease-communication notices, we suggest that the final statement should not be required if the consumer has sent an FDCPA cease-communication notice.

When a loan is charged off and the servicer will no longer accrue interest or assess fees, § 1026.41(e)(6) would not require statements but (e)(5) (the bankruptcy test) would. We request confirmation that in this event statements and early intervention would not be required.

### **D. LOSS MITIGATION**

#### ***1. Loss Mitigation Options Unavailable***

Proposed revised comment 41(b)(1)-1 would permit servicers to stop collecting information for loss mitigation options after confirming the borrower is ineligible for that option. This is helpful. It is consistent with HAMP, which requires servicers to pre-screen borrowers for potential HAMP eligibility.<sup>203</sup> Further, the Dodd-Frank Act makes certain loss mitigation programs, including HAMP and HARP, unavailable to those convicted of certain crimes.<sup>204</sup> In this case, processing an application for HAMP or HARP should be unnecessary.

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<sup>203</sup> HAMP Handbook Chapter II 2.2, *Borrower Solicitation*.

<sup>204</sup> Dodd-Frank Act § 1481(d).

The proposed comment also provides that the servicer could not stop collecting documents and information for any loss mitigation option “based solely on the borrower’s stated preference for a particular loss mitigation option.” We understand that the CFPB does not want borrowers to make uninformed decisions. However, if the borrower rejects an option, there is no point in requiring the servicer to continue pursuing it because the borrower will not participate. For example, if a borrower indicates that the borrower needs to sell the property and move, the servicer should be permitted to cease a modification application, even if the borrower may be eligible financially, because the servicer knows the borrower will reject it if offered.

The borrower should not have a private right of action based on the servicer’s failure to pursue an application for loss mitigation that the borrower has rejected or will not accept if offered.

## ***2. Short-Term Forbearance Plans***

Currently, servicers are permitted to offer short-term forbearance plans based on an incomplete loss mitigation application.<sup>205</sup> The CFPB proposes to add a requirement that these plans be in writing before they begin.<sup>206</sup> We suggest flexibility be permitted where it would benefit the borrower. Unfortunately, the proposal also requires that the offer be placed in writing before the program or plan begins. We believe this condition is detrimental to borrowers and delays helpful and urgent loss mitigation. Servicers should be able to enter into a verbal agreement with the borrower and follow up with written terms and duration.

To illustrate our suggestion, we present the following scenario: suppose a loan payment is \$1000, and the borrower is two months delinquent. The borrower and servicer orally agree on monthly payments of \$1400 for five months to cure the delinquency. A payment is due today but the agreement cannot be written by today. Absent the plan, the “correct” payment today would be \$3000. If the borrower pays \$1,400 today as mutually agreed (before receiving written information), it would stop the progression of foreclosure and all the consequents of delinquency. That benefits the borrower.

We also believe that the conditions associated with a repayment plan should be consistent with those of a forbearance plan because they are often used together. Under comment 41(c)(2)(iii)-1, the borrower can forbear up to six months of payments and repay this amount over an unlimited number of months; whereas a repayment plan would only allow three months of missed payments to be paid over six months.<sup>207</sup> We suggest that these be consistent.

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<sup>205</sup> 12 C.F.R. § 1024.41(c)(2)(iii).

<sup>206</sup> Proposed § 1024.41(c)(2)(iii).

<sup>207</sup> Proposed comment 41(c)(2)(iii)-4.

## **VI. IMPLEMENTATION TIME**

This rulemaking will create significant implementation burdens on mortgage servicers, even without the successors in interest proposal. The mortgage industry has been implementing very significant regulatory amendments, and amendments to amendments, for years. The Title XIV amendments did not have sufficient implementation time.

The present rulemaking is not subject to a statutory implementation deadline. We respectfully request that the CFPB permit servicers up to 24 months to implement the changes resulting from this rulemaking, and we request an explicit safe harbor for servicers who are able to come into compliance earlier.

## **VII. OTHER MATTERS**

### ***1. Bankruptcy Tests in Regulations X and Z Are Similar***

The bankruptcy tests proposed in Regulations X and Z differ in their terminology in some areas although no reasons is apparent. For example, Regulation X uses the phrase “The borrower is a debtor in bankruptcy” while Regulation Z uses the phrase “The consumer is a debtor in a case under the U.S. Bankruptcy Code[.]” Regulation X uses the phrase “The borrower has discharged personal liability for the mortgage loan through bankruptcy” while Regulation Z uses the phrase “the consumer has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328[.]”

The language in Regulations X and Z should be the same where the meaning is the same.

### ***2. Requests for Owner Information***

The CFPB proposes that when a borrower requests owner or assignee information, and the loan is in a trust for which the trustee receives payments, the servicer would be permitted to identify the trust name and the trustee’s name and contact information; but if Fannie Mae or Freddie Mac is the investor, guarantor, or trustee, the servicer would only need to provide the GSE’s name and contact information. If the request expressly asks for the name or number of the trust or pool, even for GSE loans, the servicer must provide, as applicable, the trust name, and the trustee’s name, address, and contact information. The CFPB proposes to add commentary to clarify that the servicer is not the owner or assignee if the servicer holds the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer. These are helpful.

### ***3. Lender-Placed Insurance Notices***

The proposal would amend § 1024.37(c)(2)(v) (contents of initial notice) and § 1024.37(d)(2)(ii) (content of reminder notice) to permit notice of existing but insufficient coverage. The proposal would include in reminder notices a warning that

insurance the servicer purchases may cost more and cover less. The proposal would permit including the account number on initial, reminder, and renewal notices. Finally, the proposal would apply the § 1024.37(c)(3) formatting requirements to the reminder notice.

These are all helpful. We suggest that machine-readable codes should also be permitted in notices.

## **VIII. CONCLUSION**

We encourage the CFPB to reduce conflicts of laws and to improve communications with consumers about their mortgage loans and their rights. As the CFPB works through the significant issues presented in this rulemaking, we would be very pleased to provide additional information and input.

We appreciate this opportunity to provide input on proposed amendments to the CFPB's mortgage servicing regulations, and thank you for your consideration of our views.

Sincerely,

American Financial Services Association  
Consumer Mortgage Coalition