October 9, 2012

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

RE: 2012 Truth in Lending (Regulation Z) Proposed Mortgage Servicing Rules and 2012 Real Estate Settlement Procedures Act (Regulation X) Proposed Mortgage Servicing Rules
Docket Numbers CFPB-2012-0033 and CFPB-2012-0034
RIN 3170-AA14

Dear Ms. Jackson:

The Mortgage Bankers Association[1] ("MBA") appreciates this opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB" or "Bureau") on its Proposed Rules to amend regulations under the Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA") regarding residential mortgage loan servicing.

As a preliminary matter, we would like to commend the CFPB for providing various opportunities to express the industry's views prior to publication of this Proposed Rule. We are pleased with the continued willingness of the CFPB and its staff to consider the industry's views and offer alternatives.

Presently, servicers face an overwhelming multitude of standards and rules, as well as, enforcement and regulatory actions. Adding to the servicer's challenges are the frequency and speed of change created by the Dodd-Frank Act, changes to state laws and regulations, local ordinances, court rulings or requirements, Fannie Mae and Freddie Mac standards, FHA requirements, Veterans Affairs' (VA) requirements, Rural Housing Service (RHS) requirements, and HAMP requirements. Almost every aspect of the servicer's business is regulated in some fashion, but no two servicing standards are alike, placing servicers in a position of having to understand and implement extensive and complex requirements.

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

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We appreciate the CFPB's efforts to create reasonable national mortgage servicing standards that will protect homeowners and that attempt to standardize various rules and policies. In developing servicing standards, we believe it is important to pay careful attention to the cost/benefit of change for both large and small servicers and borrowers. When making changes to the current model we need to be mindful of unforeseen and unintended consequences that could result ultimately in higher costs for consumers, fewer benefits or options to borrowers, and reduced access to credit.

In addition, it is critical that this rulemaking be done correctly, with careful consideration and an understanding of specific borrower needs and servicer limitations. These considerations will allow the mortgage servicing industry to better provide procedures and specific options tailored to assist borrowers with home retention and loss mitigation solutions.

Executive Summary

The MBA offers the following Executive Summary of the key points made in this comment letter concerning the CFPB's Proposed Servicing Rules that amend the Real Estate Settlement Procedures Act ("RESPA"), Regulation X, and Truth in Lending Act ("TILA"), Regulation Z:

I. General Concerns

The CFPB should limit the rulemaking to those requirements mandated by the Dodd-Frank Act and use its exemption authority to alleviate unduly burdensome statutory requirements. We urge the CFPB to limit much of its rulemaking to those items required by the Dodd-Frank Act. This is especially appropriate where servicers are already performing the services or activities sought to be regulated, such as providing periodic statements and producing ARM disclosures, albeit in a different format and with some varying content.

Discretionary servicing items should not be subject to a private right of action. Numerous provisions in the Proposed Rule are not required by the Dodd-Frank Act, TILA or RESPA. Nonetheless the CFPB rules grant borrowers a private right of action against servicers for failing to follow requirements that were not authorized by Congress in the Dodd-Frank Act and which are not within the scope of RESPA or TILA. Of particular concern are the default servicing and information management provisions that carry the potential for significant liability for servicers and assignees. While the preamble to the loss mitigation provisions states that the CFPB does not impose a duty on a servicer to offer loss mitigation or to approve any particular borrower for a loss mitigation option, it imposes a private right of action if the servicer fails to comply with enumerated steps. We are concerned that courts may interpret the requirements to go beyond mere process. Allowing for private rights of action for procedural steps also ensures the means to delay foreclosures through claims of factual dispute. We recommend that these and other discretionary provisions that were not enumerated in the Dodd-Frank Act be specifically excluded from private rights of action and related statutory remedies to ensure the continued availability of loss mitigation options to borrowers.

The CFPB should take appropriate time to formulate the final rule and adopt appropriate implementation periods to ensure final rules are applied correctly and to avoid undue regulatory burden. Given the numerous regulations that must be implemented as a result of the Dodd-Frank Act, we believe the CFPB should take the appropriate time to finalize the rules to allow for consideration of stakeholder comments. In addition, the CFPB must provide a sufficient implementation period so servicers can comply given the current environment. We recommend servicers have at least two years from the date of publication to implement final rules. Small servicers should have two and a half years to implement the final rules.

The small servicer exemption should be expanded to include more servicers, varying corporate structures, and additional types of relief. The proposed exemption is too narrow. "Small servicer" should be defined as a company that services $10 billion in residential mortgage loans or less, indexed to overall growth in mortgage debt outstanding. Independent mortgage servicers should be eligible for the exemption. Small servicers should be afforded other relief and alternatives beyond the periodic statement and should be given additional time to comply with the final rules.

II. Real Estate Settlement Procedures Act

Loss Mitigation

The loss mitigation proposals create a private right of action with statutory damages for failing to meet the procedural steps, including substantive errors. The loss mitigation proposals vastly expand the servicer's risk of liability and foreclosure delays. While we appreciate the CFPB's indication in the Proposed Rule that servicers, owners, assignee, guarantors, or insurers are not required to offer loss mitigation, the procedural steps have the effect of imposing certain requirements and liabilities on servicers that will increase private suits. Because the Dodd-Frank Act did not address loss mitigation activities, servicers should not be subject to private rights of action with statutory damages, actual damages and attorney fees, where no such claim or right in law exists today and which the courts have repeatedly dismissed.

The loss mitigation provisions should not include language that a borrower be evaluated for "all" loss mitigation options, as this would require the borrower to gather a substantial amount of information to be evaluated for every loss mitigation option and it would potentially delay the submission of a "complete loss mitigation application." Evaluating a borrower for "all" loss mitigation options would inconvenience borrowers and likely result in borrowers submitting more incomplete loss mitigation applications. Furthermore, evaluating a borrower for a short sale upfront, when a borrower has requested a home retention option, seems contrary to the goal of keeping more borrowers in their homes. This is especially true for many home retention cases where all that is needed is a reduced interest rate and a change in term. In addition, eligibility for a loss mitigation option should be determined by the investor's predetermined waterfall options. The Proposed Rule would potentially conflict with the servicer's obligation to follow agency and investor requirements. As an industry, we should strive for home retention options. However, if the cost to offer loss mitigation becomes too high, loss mitigation options to borrowers will diminish.

Sharing loss mitigation applications with other lienholders would violate privacy and create unintended negative borrower consequences. The Proposed Rule provides that servicers who receive a complete loss mitigation application are required to send it to servicers of other mortgage lienholders within five days of receipt. The receiving servicer must comply with the procedures outlined in the Proposed Rule as if such application was received directly from the borrower. The Proposed Rule conflicts with consumer financial privacy laws and corporate safeguards imposed to secure borrower's non-public private information. Also, it should be a borrower's responsibility to begin the loss mitigation process, not the duty of a servicer.

The Proposed Rule should not require oral loss mitigation contracts; it would run counter to the CFPB's efforts to *improve* consumers understanding of their mortgage loans. Oral acceptances of permanent loss mitigation offers should not be required because they are contrary to investor and federal agency requirements, certain state laws, the statute of frauds, and consumer protection.

<u>Error Resolution and Information Requests</u>

The CFPB should not provide consumers the option to submit oral requests for error resolution and information. The Qualified Written Request ("QWR") was enacted by Congress to ensure that servicers acknowledged receipt of valid written requests to correct account errors and to deliver information requested by the borrower. RESPA's QWR process offers servicers an appropriate audit trail to show evidence of compliance with the law. The CFPB's proposal to subsume QWRs within a regime of oral requests for error resolution and information is inconsistent with RESPA and the Dodd-Frank Act amendments to RESPA. Moreover, the proposal would have a profound impact on the servicers' operation in terms of liability, staffing, technology, and cost. Despite much appreciated efforts to limit the servicers' costs and exposure through dedicated phone lines and addresses and by defining what is a "covered error," the proposal imposes an extreme burden for servicers.

<u>Information Management Policies and Procedures</u>

We applaud the CFPB for allowing servicers, rather than regulations, to determine how to come into compliance with the stated objectives for information management policies and procedures; however, documentation requirements are problematic. We are concerned about the requirement that servicers create a defined standard "servicing file," which would be provided to the borrower upon request, at the servicer's expense and without any reasonableness standard. Much of the proposed information that must be retained and remitted to the borrower is proprietary and generally not appropriate or helpful to borrowers. As outlined, the Proposed Rule would require so much information that a consumer would likely be overwhelmed and possibly not understand the information presented. In addition, the requirement that servicers retain files or records for the period of time they serviced the loan plus 12 months must be applied prospectively to loans originated after an appropriate implementation timeframe; with a more limited exemption to be applied on a prospective basis. The Information Management provisions are not required by the Dodd-Frank Act and, therefore, no private right of action should attach.

Lender-Placed Insurance

Borrowers should be adequately informed about lender-placed insurance. The Proposed Rule addresses the timing and content of the borrower notices, the termination of lender-placed insurance and refunds, and what constitutes verification of coverage. Of primary concern is the requirement that servicers provide borrowers with good faith estimates of the cost of lender-placed insurance because that information is not readily available to servicers who process their warning letters in-house. Estimates may potentially be incorrect and could confuse or even frustrate a borrower. Rather than a good faith estimate, a servicer should be permitted to include a statement that a lender-placed policy may likely be more expensive than a borrower-purchased policy. Also, servicers are concerned with the inability to communicate how borrowers can submit proper evidence of insurance to avoid lender-placed insurance.

Early Intervention for Troubled or Delinquent Borrowers

Borrower outreach should allow for collection of delinquent accounts and should permit behavioral modeling to ensure proper attention to those at high-risk of foreclosure. Not all borrowers that fail to make a payment by the 30th day of delinquency are at high risk of foreclosure. Servicers should be able to seek collection for loans that are not severely delinquent before discussing loss mitigation alternatives. The CFPB should allow servicers that use behavioral modeling to call low-risk borrowers by the 45th day of delinquency. Further, the CFPB should require written notice to borrowers by the 45th day of delinquency to coincide with other disclosures. The Early Intervention provisions are not required by the Dodd-Frank Act and, therefore, no private right of action should attach.

Continuity of Contact with Delinquent Borrowers

The continuity of contact provisions must be appropriately managed to ensure that servicer's resources are best deployed to borrowers that need the assistance. We applaud the CFPB for permitting flexibility in how the servicer implements the continuity of contacts requirements and the fact that a single point of contact is not required. We believe the Proposed Rule would be most effective if it required assigning personnel upon request of a need for loss mitigation assistance, and retaining such assignment until loss mitigation options have been exhausted. The Continuity of Contact provisions are not required by the Dodd-Frank Act and, therefore, no private right of action should attach.

III. Truth in Lending

ARM Rate-Change Reset Notices

The proposed changes to the subsequent ARM rate-change notice are unduly burdensome on servicers and may not be as robust as current disclosures. The initial ARM reset notice will confuse borrowers and should be limited in scope. We recommend that the CFPB not overhaul the subsequent ARM rate-change notices and not expand the initial ARM reset notice beyond hybrid ARMs. We appreciate the CFPB's grandfathering of loans originated before July 21, 2013 with look-back periods of 45 days or less. The grandfather period should be extended to coincide with the final implementation date of the subsequent

ARM disclosure, however, or be extended with enough time to implement the changes after FHA, VA and the GSEs make official changes to their notes, whichever is later.

Periodic Billing Statements

The proposed content and format of the periodic statement are different than what is produced today. The changes would require significant systems enhancements. There is no indication that statements in use today are insufficient, yet the cost of retooling statement systems is extremely high. We recommend limiting changes to periodic statements to those required by the Dodd-Frank Act. We also request that the CFPB consider using its exemption authority to eliminate the requirement to identify a prepayment penalty amount on the periodic statement. Periodic statements should not be required for loans that have been accelerated or are in bankruptcy. FHA's interest accrual amortization payments and closing cost reimbursements should not be defined as prepayment penalties for any purposes and should not be required on a periodic statement.

Prompt Crediting of Payments and Partial Payments

We support the ability, but not the requirement, to use suspense accounts for partial payments. In addition, we recommend that the application of payments from suspense accounts must recognize loans that are subject to statutory requirements for breach notices, acceleration, and bankruptcy.

Payoff Statements

Generally the proposal to provide payoff statements within seven business days of a written request is acceptable. Additional time should granted to servicers in the case of reverse mortgages, shared appreciation loans, delinquent and accelerated loans, and loans in bankruptcy due the complexity of these situations.

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GENERAL COMMENTS and PRINCIPLES

I. Concerns and Principles

Before addressing the specific sections outlined in the Proposed Rule, we would like to reiterate certain overarching concerns with the Proposed Rule that we believe the CFPB should consider when developing the final mortgage servicing rules.

Discretionary Servicing Provisions Should Not Be Subject to Private Rights of Action: Numerous provisions in the Proposed Rule are not required by the Dodd-Frank Act, RESPA or TILA. Of particular concern are the default servicing and information management provisions that carry with them the potential for significant liability.

The CFPB cites Section 6(k)(1)(E) as the basis for its discretionary authority to propose and create the discretionary servicing regulations.[2] However, Section 6(k)(1)(E) only grants the CFPB authority to promulgate regulations that are appropriate to carry out the consumer protection purposes of RESPA. Congress, in drafting RESPA, set forth the Act's specific purpose as follows:

> The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country…
>
> It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—
> (1) in more effective advance disclosure to home buyers and sellers of settlement costs;
> (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
> (4) in significant reform and modernization of local recordkeeping of land title information.[3]

Certain portions of the CFPB's proposed alterations to Regulation X exceed the purposes of RESPA. For instance, the CFPB's attempts to regulate loss mitigation activity are not related to settlement practices or any of the other stated purposes of RESPA. Given the fact that the CFPB is seeking discretionary items that go beyond the stated purposes of RESPA, we question whether the CFPB can impose a private right of action. To the extent the CFPB moves forward with these discretionary items, we believe it is appropriate to expressly exclude those Sections from the private right of action liability of RESPA § 6(f).

[2] The Early Intervention, Continuity of Contact, Loss Mitigation, Information Management, and other provisions that exceed the statute.
[3] 12 U.S.C. 2601.

Avoid Unnecessary Changes: We ask that the CFPB not override existing industry practices or create new disclosures without determining that existing practices or forms do not work. As you are aware, change imposes significant pressure on servicer costs, resources, and capacity. The mortgage industry has been going through chronic, piecemeal regulatory changes for some time, with no end in sight. The costs are becoming prohibitive for many smaller, and even larger, companies. And, these costs will eventually be passed on to consumers. As a result, we ask that the CFPB consider not exceeding the provisions of the Dodd-Frank Act. In many instances, servicer practices are acceptable or superior to proposed changes. For example, the Springside proposed periodic statement, presented in the Proposed Rule, exceeds the specified requirements of the Dodd-Frank Act and appears designed to replace existing monthly statements even though information given to borrowers today is substantively similar. The cost of retooling systems is significant. Another example is the CFPB's proposal to overrule contractual terms that require borrowers to provide proof of borrower-purchased insurance. While the CFPB is granted the authority to define what is "sufficient evidence," we do not understand why it would ignore existing requirements of other government agencies and requirements consistent with the Flood Disaster Protection Act of 1973 ("FDPA").

Use Exemption Authority to Eliminate or Alter Problematic Provisions: We ask that the CFPB use its exemption authority to exclude servicers from problematic provisions that seem to largely duplicate existing business practices.

Avoid Competing or Conflicting Requirements: The issue of preemption is a very real and serious concern for the industry as states are encouraged to exceed Dodd-Frank Act provisions and CFPB rules. The result, however, can impact compliance, especially as it relates to the current broad interpretation of what is an unfair and deceptive act or practice ("UDAP") under state law or an unfair, deceptive, or abusive acts and practice ("UDAAP") under the Dodd-Frank Act.[4] We are concerned that UDAP and UDAAP complaints could be lodged against servicers based on acts that *comply* with the CFPB's rules. As a result, we ask that the CFPB's rules expressly state that compliance with the final rule should not create a state UDAP violation, or violation under other federal laws and regulations, including § 1036 of the Dodd-Frank Act.

Devise Conflict Resolving Mechanism: It is important that the CFPB devise a mechanism to resolve conflicts with other laws, regulations or contracts. This mechanism should also address how to comply when there are competing, but not conflicting, requirements on the same subject. We ask that the CFPB recognize that borrowers have contractual obligations to servicers, servicers have contractual obligations to investors, and servicers are subject to several sets of guidelines, and regulations.

Promulgate Principles/Objectives Not Prescriptive Rules: We applaud the CFPB's approach in several sections to develop servicing rules that indicate an outcome rather than issue

[4] The Dodd-Frank Act authorizes the CFPB to define UDAAPs, but rather than give guidance on the definitions, the Act sets a few very broad parameters on the definitions. Dodd-Frank Act § 1031. The industry, as a result, can only guess what a UDAAP might be. At the same time, the Dodd-Frank Act plainly prohibits UDAAPs. Dodd-Frank Act § 1036. Consumer financial services providers, therefore, face liability without any prior notice.

prescriptive operational requirements. This allows servicing practices to evolve with the changing needs of the market without a continuing need for complicated rule changes. Moreover, this would reduce the cost of implementation for servicers without sacrificing consumer protection. We also appreciate the flexibility proposed for servicers in establishing continuity of contact arrangements with defaulting borrowers and information management objectives. The Proposed Rule would allow servicers to continue with proven business models and practices in these areas or to improve their processes without necessitating rule changes. We believe, however, that the CFPB could provide greater flexibility along these lines with regard to disclosures and notices. We also urge the CFPB to adopt this flexible approach throughout the examination process. The industry and consumers will benefit from examination standards that accept different processes and procedures to achieve the stated objective.

Recognize Settlement Agreements: We request that the CFPB recognize that the largest servicers are subject to settlement agreements with the state Attorneys General (the "Settlement Agreements") and that to the extent a term of the Settlement Agreements differs from a CFPB rule, those servicers must be permitted to comply with the Settlement Agreements. Similarly, we ask that the CFPB recognize and adopt certain standards found in the Settlement Agreements because they achieve the consumer protection objectives with the least cost to the industry.

Expand the Recognition of Size and Diversity of Servicers: We are pleased that the CFPB in some areas recognizes differences in the size and diversity of servicers and business models. We believe the CFPB should expand the small servicer exemption and remove the requirement that the small servicer only service its portfolio. In this respect, we seek additional exemptions and alternative compliance options for smaller servicers.

Rules Should Facilitate Servicing Transfers: New standards should not impair the ability of servicers and investors to transfer servicing to better performing servicers, or to entities specializing in certain types of mortgage loans. Servicing portfolios need to remain liquid. The Proposed Rule appears to create assignee liability in the event of a servicing transfer. This is especially true in the Information Management provisions that would hold transferee servicers liable for incomplete records and the inability to present the borrower with a complete "servicing file."

II. Small Servicer Exemption

The Regulation Z proposal includes a partial exception for firms that service one thousand or fewer mortgage loans and service only mortgage loans that they originated or own.[5] Servicers that meet these conditions, however, are only exempt from the need to produce a periodic statement in conformity with the Proposed Rule. Despite considering other exemptions as part of the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process, the Bureau has declined to extend additional relief. We are extremely concerned with the CFPB's definition of small servicer.

[5] Proposed § 1026.41(e)(4).

Of primary concern is the extremely limited scope of the exemption. The definition of a "small servicer" excludes all but a handful of servicers. A one thousand loan servicer amounts to a servicer with approximately one full time employee.[6] The loan cap provides no relief for the vast majority of small servicers simply by the fact that servicing is dependent on volume to offset the high cost of technology, staffing, and servicer advances. Further, defining a small servicer as one that services only for its own portfolio provides no relief to many of the smallest banks and credit unions that sell loans servicing retained. All independent mortgage companies are excluded because their capital structure requires them to sell loans or securitize them. In its final form, the Proposed Rule will only serve to force mortgage companies to sell loans servicing-released to large aggregators. Most small independent servicers operate as Federal Housing Administration ("FHA") servicers and conform to FHA's rules and regulations. Those rules do not necessarily conform to the Proposed Rule. Yet, FHA servicers operate prudently and according to government agency standards and requirements. FHA servicing rules have not been condemned or found to be flawed.

Some of the highest cost provisions of the Proposed Rule are associated with the reinvention and creation of forms and with documentation: the monthly statement, the initial ARM reset disclosure, the subsequent ARM disclosure, the error resolution and document request communications; lender-placed insurance warning and renewal letters; the distribution of the "servicing file," to name a few. With the exception of the initial ARM reset notice, servicers are already performing the functions the Proposal Rule seeks to address. Servicers already provide subsequent ARM rate change notices, they already resolve errors and provide information, they provide periodic statements or coupon books; and produce lender-placed insurance warning letters. In some cases, we would argue the current notices are superior to those proposed by the CFPB. In other cases, the CFPB's Proposed Rule imposes on the industry substantial new costs for only a marginal "informational" benefit to the consumer. What appear to be minor adjustments for servicers may not be; but would require significant retooling of systems and procedures and require servicers to enter into new vendor agreements to comply. All are costly.

MBA urges the CFPB to provide a more meaningful and relevant definition of "small servicer" and list of exemptions or alternatives.

Recommendation

We urge the CFPB to define a "small servicer" as a company that services $10 billion in residential mortgage loans (e.g., unpaid principal balance) or less, indexed to the overall growth in mortgage debt outstanding. A $10 billion dollar servicer services approximately 65,000 loans.[7] The CFPB is urged to remove the requirement that a small servicer service only for its portfolio. Our proposed definition benefits the community-based mortgage companies, banks, and credit unions that operate in local or regional markets. It also does not discriminate against independent mortgage companies that are servicing government, Fannie Mae or Freddie Mac (the GSEs) loans.

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[6] MBA's 2012 Annual Performance Report indicates that for servicers under 50,000 loans, the number of loans per full-time employees is approximately 996.
[7] The average loan amount is $155,000 according to MBA's 2011 Benchmarking Studies.

We describe our recommended exemptions and alternatives for small servicers in more detail within certain sections below.

III. Implementation Date

The preamble of the Proposed Rule states that, "[w]here rules are required to be issued, Dodd-Frank permits the Bureau to provide up to 12 months for implementation. For all other rules the implementation period is left to the discretion of the Bureau."[8]

The CFPB has significant authority to postpone rulemaking. RESPA § 19(a) provides the CFPB with broad exemption authority:

> The Bureau is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter.

Similarly, TILA § 105(a) provides the CFPB with broad exemption authority to facilitate compliance with Regulation Z and TILA:

> Except with respect to the provisions of section 129 that apply to a mortgage referred to in section 103(aa), such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

The Dodd-Frank Act reinforced these authorities by providing the CFPB authority to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[9] Further, Dodd-Frank provides:

> The Bureau, by rule, may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of this title, or from any rule issued under this title, as the Bureau determines necessary or appropriate to carry out the purposes and objectives of this title, taking into consideration the factors in subparagraph (B).[10]

The referenced factors include "existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections."[11]

[8] 77 Fed. Reg. 57200, 57208, (September 17, 2012), Preamble.
[9] Dodd-Frank Act § 1022(b)(1).
[10] Dodd-Frank Act § 1022(b)(3).
[11] Dodd-Frank Act § 1022(b)(3)(B)(iii).

There is no question that the CFPB has authority to extend or amend the Title XIV deadlines where appropriate. This letter describes a number of areas where compliance with the proposed servicing rules is not feasible by the Title XIV deadline. This letter also describes a number of areas where the Proposed Rule would impose significant regulatory burden even though existing practices are more than adequate for consumers.

The MBA respectfully requests that the Bureau delay the effective date of the affected Title XIV requirements beyond the statutory deadline using its above referenced authority. The CFPB should take the time necessary to provide appropriate and thoughtful requirements that work for borrowers and servicers, rather than rush to implement problematic requirements.

Regardless of the issuance date of any final rule, servicers must be afforded a two-year period to implement the Dodd-Frank Act requirements. We believe this additional time is warranted given the competing demands created by the Dodd Frank Act, the discretionary items in the Proposed Rule, and other changes that continue to occur in the industry with regard to Fannie Mae, Freddie Mac, and FHA, to name a few.

For items left to the Bureau's discretion under the final rule, we suggest a longer implementation period that would not begin before 30 months after publication of the rules.

Smaller servicers should be afforded additional compliance time given that many technology vendors roll their clients onto new software and technology by size. We suggest a 30-month implementation timeline for small servicers on all aspects of this servicing proposal.

These timelines could be reduced if the CFPB limited the scope of the final rule to those items required by the Dodd-Frank Act and those other critical items that the CFPB believes must be adopted to avoid material harm to borrowers.

Mortgage companies face unprecedented regulatory change as a result of discretionary and Title XIV rulemakings, including rulemaking to implement changes to the Home Ownership and Equity Protection Act of 1994 ("HOEPA");[12] two appraisal rulemakings; and a rulemaking to implement new provisions on loan originator compensation. Perhaps the most significant pending mortgage rulemaking required by Title X of the Dodd-Frank Act, is the Know Before You Owe ("KBYO") rulemaking to integrate origination disclosures required by RESPA and TILA, something the industry has badly needed for many years. Although not subject to the Title XIV deadline, it was proposed on July 21, 2012, overlapping the other rulemakings. Likewise, the industry awaits final rules on escrow accounts and the ability-to-repay (ATR"), which are subject to the Title XIV deadline. In addition, there is another extremely significant rulemaking under Title IX[13] that would impose risk-retention requirements. With the vastly expanded requirements, some understanding of the limitations on overall capacity is necessary.

We urge the CFPB not to implement its rules by an arbitrary deadline, but coordinate them in a manner that makes compliance possible, allows for additional guidance after a rule is final and

[12] Pub. L. No. 103-325, §§ 151–158, 108 Stat. 2160, 2190-2198 (1994) (codified as amended in scattered sections of the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f).
[13] Dodd-Frank Act § 941(b).

before implementation begins, uses a rational schedule, and minimizes chronic, piecemeal rule changes.

REAL ESTATE SETTLEMENT PROCEDURES ACT - REGULATION X PROPOSAL

I. Escrow Advances (Section 1024.17)

A. When to Advance Insurance Premiums

Under proposed § 1024.17, servicers would be required to advance for hazard insurance from an escrow account if the borrower were delinquent even if the escrow account has insufficient funds, unless the policy is cancelled or not renewed for reasons other than nonpayment.[14] This provision is not required by the Dodd-Frank Act. This rule is consistent with current industry practice where most investors also require that insurance remain in force for the life of the loan, whether borrower purchased or lender placed. However, if insurance is not required on the property for whatever reason and/or the lender would not lender place a policy, the servicer should not be required to advance premiums if the borrower is delinquent and escrows are depleted. Such advancement could be inconsistent with the borrower's interests by further increasing the delinquency amount. We would greatly appreciate providing this clarity in the final rule.

Recommendations

Advancing premiums should not be required when insurance is not required.

B. Treatment of Non-Escrowed Borrowers

The CFPB did not propose to require that servicers advance funds to pay hazard insurance premiums on behalf of non-escrowed borrowers for borrower-purchased insurance coverage. We support this position. The CFPB should not seek to establish requirements for non-escrowed borrowers. There are many challenges and impediments regarding any effort to require advancing borrower-purchased insurance premiums and optional insurance products such as non-mandatory flood insurance (e.g., properties not in special flood hazard area) on non-escrowed borrowers.

First, servicers are bound by the provisions of the deed of trust or mortgage and thus should not be required to breach or exceed them.

Second, servicers cannot simply advance borrower-purchased insurance premiums for non-escrowed borrowers. In many cases, borrowers with lapsed policies have merely changed insurance carriers, but are otherwise insured. If the servicer could identify the previous insurance carrier, which is questionable, reinstating a previous policy would result in duplicative insurance policies in many cases. The servicer would have to cancel the policy it placed. However, because the insurance contract is with the borrower, the refund would be paid to the

[14] Proposed § 1024.17(k)(5).

borrower not refunded to the servicer. The servicer would then have to collect the refund from the borrower. If the borrower is delinquent, it is unlikely that the borrower would refund the money to the servicer. The end result is additional losses in foreclosure and the need to seek deficiency judgments.

Third, the servicer of a non-escrowed account does not receive an insurance bill and thus generally does not have the information to determine how much to pay, to whom, and where to send the payment.

Fourth, servicers are usually not alerted of a borrower's failure to pay an insurance premium prior to the renewal due date. As a result the ability to reinstate is limited because often the policies have already lapsed.

Fifth, as stated earlier, servicers have been victims of borrower fraud or acts of conversion when the borrower cancels an insurance policy the servicer paid for, and collects a refund of the up-front annual servicer-paid premium (this cannot happen with lender-placed insurance).

Sixth, a requirement for servicers to create escrow accounts for non-escrowed delinquent borrowers would conflict with other provisions of the Dodd-Frank Act that amended TILA, which excluded certain first lienholders and all second lienholders from the need to escrow.[15]

Seventh, servicers should not be required to escrow or advance for insurance that exceeds the secured interest, such as insurance of furniture, art, jewelry or liability. Moreover, servicers should not be required to establish an escrow or advance for optional insurance such as flood insurance when not mandated by law.

In the preamble relating to Section 1024.17(k), the CFPB references Fannie Mae's Announcement SVC 12-04 as a basis for indicating there are diverging views on whether servicers should be required to advance for non-escrowed borrowers. It is important to note that that announcement has been revoked. Currently there are no diverging views from the GSEs. Servicers are not obligated to advance premiums to maintain borrower-purchased insurance for non-escrowed borrowers.

<u>Recommendation:</u>

The CFPB should not seek to require advancing of borrower-purchased insurance premiums for non-escrowed accounts.

II. Timely Payments by Servicer – Crediting of Excess Escrow Funds (Section 1024.34)

This section of the Proposed Rule deals with crediting excess escrow funds after payoff to a new escrow account. Of concern is a troubling ambiguity in both the statute and the

[15] TILA § 129D requires escrows in some cases, but permits them in others. However, it exempts certain small servicers from mandatory escrows. TILA § 129D(c). A Regulation Z requirement to escrow would conflict with that exemption.

implementing regulations regarding the ability of a servicer to transfer funds retained in the escrow account to a new lender or to credit against the outstanding balance. While there is no explicit prohibition on this practice in either Dodd-Frank or the Proposed Rule, the use of "same lender" in both creates uncertainty over whether a servicer can credit any excess escrow account balances to a new escrow account for a new mortgage loan with a new lender and whether it can net excess escrow funds against the outstanding balance of the old loan.

The section of Dodd-Frank amending RESPA § 6(g) was intended to make clear that servicers were not required to transfer excess retained escrow funds to a new lender, a sensible provision given that servicers often must wait for funds to clear before they can ensure full payoff has occurred. If the escrow account is established with the same lender, the fear of loss is simply not present as the shortfall funds could be recouped from the customer.

There is no indication, however, that the Dodd-Frank Act sought to prohibit a servicer from transferring the retained escrow funds to an escrow account established by a new lender with the borrower's consent. Likewise, the Dodd-Frank Act did not prohibit the servicer from netting excess escrow funds against the outstanding balance to be paid off (e.g., unpaid principal balance, accrued interest and fees) if the borrower wanted to do so. Most servicers, however, will not "net escrows" unless the loan is being refinanced with their institution because of the risk of an NSF or cancelled ACH payment that would render the completed payoff short . However, if the servicer is willing to do such a transfer with a new lender, it should be permitted to do so if the borrower so requests. We believe that this practice is fully consistent with the CFPB's stated desire in the preamble of the Proposed Rule to "allow the amounts [retained in escrow] to be smoothly transferred without the need for the borrower to expend funds to fund a new escrow account."[16] Moreover, clearing up any ambiguity on these points would give servicers that choose to make such transfers to new and different lenders the flexibility to aid their customers.

Recommendation

The final rule should make clear that a servicer (1) may promptly return any retained balance to the borrower within 20 business days or (2) may, but is not required to, credit the funds to an escrow account for the borrower's new mortgage loan with either the same or a new lender or credit it against the outstanding balance (e.g., the total amount owed on the payoff statement).

III. Error Assertions and Information Requests (Sections 1024.35 and 1024.36)

A. Background and Overarching Concern

Enacted years before the Dodd-Frank Act, RESPA § 6(e) has required servicers to respond to QWRs by acknowledging receipt within 20 days, and to correct any errors or provide certain information within 60 days. If the QWR disputes the borrower's payments, the servicer must suspend reporting overdue payments to credit bureaus for 60 days. By statute, a QWR includes written correspondence, other than on a payment coupon, that enables the servicer to identify

[16] 77 Fed. Reg. 57318, 57221, (September 17, 2012), Preamble.

the borrower and account, and that describes an account error or requests information, "relating to the servicing of such loan[.]"[17]

The Dodd-Frank Act amended § 6 to speed QWR responses and to narrow the QWR definition to valid QWRs. It also identified specific items that servicers must handle.

The Dodd Frank Act:

- Reduced the QWR acknowledgement time from 20 to 5 days.[18]
- Reduced the QWR response time to 30 days, extendable to 45 days.[19]
- Prohibited servicers from charging fees to respond to "valid" QWRs, and require the CFPB to define the term valid QWR.[20] In other words, servicers have a statutory right not to respond to invalid QWRs.
- Requires servicers to take "timely action" to correct issues identified in § 6(k)(1)(C) , which are payment application errors, payoff balances, and avoiding foreclosure.[21]
- Requires servicers to identify the loan owner or assignee within ten days of request.[22]

The CFPB has interpreted this language in § 6(k) to impose a regime of oral requests for information and error resolution that subsume the entire QWR process. We express extreme concern with this interpretation and expansion.

In devising a new system of oral requests, the CFPB unfortunately creates numerous problems:

- The CFPB proposes to intermingle the QWR procedures with the procedures for responding to issues specified in § 6(k)(1)(C) and (D). It is our belief that Congress wanted to clarify certain *subcategories* of requests that are considered servicing duties (e.g., those listed in § 6(k)(1)(C) and (D)). The CFPB, however, does not define "valid" QWR as Congress explicitly required, but does define what is not a valid assertion of error or proper information request, which is a narrower subset of issues.

- The CFPB would apply QWR procedures to oral communications. RESPA defines a QWR as a "written" request, using the word "written" in *eight separate places,* one of which the Dodd-Frank Act *added*.[23] Congress was explicit and insistent that QWRs survive the Dodd-Frank Act and *must be written*. Oral QWRs are simply unworkable, as we explain below. With *oral* QWRs, servicers would largely be unable to distinguish valid from invalid QWRs.

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17 RESPA § 6(e)(1).
18 RESPA § 6(e)(1)(A).
19 RESPA § 6(e)(2) and (4).
20 RESPA § 6(k)(1)(B).
21 RESPA § 6(k)(1)(C).
22 RESPA § 6(k)(1)(D).
23 RESPA § 6(e)(1)(A), (1)(B), (2), and (3); RESPA § 6(f)(3); RESPA § (k)(1)(B). Dodd-Frank added § 6(k).

Congress narrowed the QWR procedures by removing servicers' duty to respond to abusive or invalid QWRs. It separately specifically identified certain borrower requests for information and correction of errors in § 6(k)(1)(C) and (D) to which servicers must respond. The proposal would, in contrast, vastly *expand* the QWR definition to include oral communications that are "covered errors."

While we agree that the plain language of the statute does not state whether those items identified in § 6(k) may be communicated orally or in writing, it is clear Congress did not intend to replace QWRs with an regime of oral requests or it would not have taken the care to address and revise the QWR timelines. Allowing borrowers to make oral requests of this nature would effectively subsume QWRs and make them irrelevant.

Rather, we believe that Congress intended to address various court cases that narrowed the scope of a QWR. Courts appropriately would define QWRs not to include demands to verify document validity, requests about non-servicing matters,[24] such as the request to identify a loan's owner.[25]

Congress indicated that specifically identified types of requests for information and error resolution be handled in a "timely" manner. Congress did not define "timely," but did provide a specific timeline for addressing requests for the owner or assignee of the loan:

- 10 business days for servicers to respond to requests to provide the identity, address, and other relevant contact information about the owner or assignee of the loan.

Congress did not set limits for responding to a borrower's request to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding

[24] *Williams v. Wells Fargo*, No. C 10-00399 JF (HRL), 2010 WL 1463521, at *3 (N.D. Cal. Apr. 13, 2010). A written inquiry that does not relate to servicing is not a QWR. *Lettenmaier v. Federal Home Loan Mortg. Corp.*, No. CVk11k156kHZ, 2011 WL 3476648, at *11 (D. Or. Aug. 8, 2011). A loan servicer only has a duty to respond if the information request is related to loan servicing. *Copeland v. Lehman Bros. Bank*, FSB, No. 09-1774-WQH-RBB, 2010 WL 2817173, at *3 (S.D. Cal. July 15, 2010).
[25] *Paschette v. Wells Fargo Bank, N.A.*, No. 6:11-cv-442-Orl-31GJK, 2011 WL 3962274, at *1 (M.D. Fla. Sept. 8, 2011) (RESPA does not require a servicer such as Wells Fargo to provide the identity of the owner of a loan); *Dietz v. Beneficial Loan and Thrift Co.*, No. 10k3752 (DWF/TNL), 2011 WL 2412738, at *4 (D. Minn. June 10, 2011) (holding that information regarding loan ownership fell outside of the scope of a QWR); *Patton v. Ocwen Loan Servicing, LLC*, No. 6:11-cv-445-Orl-19DAB, 2011 WL1706889, at *3 (M.D. Fla. May 5, 2011) (because identifying the owner of a mortgage note does not relate to servicing the mortgage, 12 U.S.C. § 2605(i)(3), it is not a proper request in a QWR, *Id*. § 2605(e)(1)(B), and the defendant did not violate Section 2605(e)(2) merely by failing to identify the current and past owners of plaintiff's mortgage.) *Marsh v. BAC Home Loans Servicing, LP*, No. 2:09-cv-813-FtM-29DNF, 2011 WL 1196415, at *8 n.8 (M.D. Fla. Mar. 29, 2011) (allegation that BAC violated RESPA by not identifying the true owner of the obligation is inaccurate. This obligation arises under TILA, not RESPA); *Skaggs v. HSBC Bank USA, N.A.*, No. 10-00247 JMS/KSC, 2010 WL5390127, at *4 n.4 (D. Haw. Dec. 22, 2010) (RESPA does not require that a loan servicer provide information on the holder of the note); *DeVary v. Countrywide Home Loans, Inc.*, 701 F. Supp. 2d 1096, 1107 (D. Minn.2010) (holding that requests regarding loan ownership issues were not QWRs).

foreclosure. We believe it is appropriate to set shorter timelines for resolving these items, in certain instances, because of their exigent circumstances in some cases.

The CFPB has proposed a timeline for responding to allegations of errors as it relates to foreclosure sales when a borrower has submitted a complete loss mitigation package. We believe the CFPB's proposed timeline is problematic because the borrower can make a request minutes before a foreclosure sale. We believe these requests for error resolution should be in writing, however, we suggest that a borrower be permitted to deliver an error resolution request up to three days (excluding Saturday, Sunday and holidays) before a foreclosure sale and expect a response from the servicer.

The CFPB also proposes that with regard to a correction to a payoff balance that the servicer be limited to 30 days and not have access to the 15 day extension. We believe that is sufficient time. It is important to stress that we concur with the CFPB that servicers should be permitted to charge a fee for a payoff statement and believe that other charges for certain information requests are appropriate.

Alleged errors with regard to the allocation of payments are not necessarily urgent and should be subject to the QWR timelines (i.e., maximum 30/45 days) because if an error is found it will be corrected using effective date crediting as if no error occurred. Late charges and adverse credit reporting will be reversed, as would any foreclosure attorney or other related fees. Borrowers also get sufficient warning of the delinquency and foreclosure that error requests with regard to an application of payment can be resolved within existing timelines. In all cases, the protections for invalid requests should still apply.

Shorter timelines must be reserved for the enumerated items in § 6(k) and should not be provided to all servicing duties. Servicers would be unable to handle all requests in abbreviated timelines especially given the complex nature of most urgent requests.

Nonetheless, we believe it is critical to require these requests to be in writing and that specific errors (not general errors) be properly identified. *Such writings protect the borrower as much as the servicer, and also assist the CFPB and the courts in resolving these issues while providing an appropriate audit trail.*

These written communications do not have to be extensive and, in fact, we believe that the CFPB should ensure that qualifying requests identify a specific error. The more precise the request, the faster the servicer can respond. The problems servicers experience today are associated with very lengthy general assertions sometimes reaching 20 or more pages. Other assertions are also problematic that generally indicate reinstatement figures are not accurate accompanied by a long list of documentation requests in specific formats and breakdowns, rather than identifying why the borrower believes the reinstatement was inaccurate, such as a specific monthly payment that was sent, but not applied, to help pinpoint resolution.

B. The Rule Creates a Complex Process of Managing to Various Standards

The Proposed Rule would repeal § 1024.21, which includes the procedures for responding to QWRs. It would create new procedures for responding to assertions of covered errors, and for responding to information requests. We respectfully object to the CFPB's proposal to strike all of § 1024.21 and create a new regime of oral and written requests for information and error resolution.

The CFPB explains:

> [T]he Bureau's intention is to establish servicer procedural requirements for error resolution and information requests that are consistent with the requirements applicable to a qualified written request under RESPA. Through this, the Bureau intends to make the restrictions and circumlocutions inherent in the language of the qualified written request provisions obsolete. Any valid qualified written request is a valid notice of error or information request. An invalid qualified written request may still be a valid notice of error or information request.[26]

The Proposed Rule would not fully integrate the § 6(e) and the new § 6(k) procedures, leaving servicers with the task of complying with both when only one or the other should apply. Distinguishing when each applies would be quite difficult for consumers and servicers both. The result would not be streamlined, but would be a confusing maze of requirements. It is not at all clear that the courts will give deference to a rule that seems to supersede the statute.

The CFPB did not propose to exempt all servicers from all QWR requirements in all circumstances, and does not have authority to do so. Given that § 6(f) imposes liability for noncompliance with both § 6(e) and § 6(k), servicers cannot ignore § 6(e) and act as if § 6(k) alone governs QWRs. To the extent there is any difference between QWR requirements and requirements of §§ 1024.35 and 1024.36, servicers would need to comply with both.

There are differences. The CFPB states that a valid QWR is a valid notice of error or information request.[27] This is not the case. A QWR that asserts an error does not necessarily assert a covered error. For example, a QWR may assert that a rate reset notice was late or inaccurate, an IRS Form 1098 was late or inaccurate or annual escrow analysis was late or inaccurate. None of these are a covered error.

The CFPB states that an invalid QWR may still be a valid notice of error or information request.[28] This is extremely problematic and would be in conflict with congressional intent to allow servicers not to respond to invalid QWRs.

The differences between § 6(e) and § 6(k)(1)(C) and (D) make compliance with the proposal quite complex. The periodic statement will provide borrowers a designated address for QWRs and, for most servicers, will provide a designated address and phone number for covered error assertions and information requests. Consumers will not know which to use.

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[26] 77 Fed. Reg. 57200, 57221 (September 17, 2012).
[27] 77 Fed. Reg. 57200, 57221 (September 17, 2012).
[29] 77 Fed. Reg. 57200, 57221 (September 17, 2012).
77 Fed. Reg. 57200, 57221 (September 17, 2012).

The servicer's tasks would also be excessively complicated. If a QWR arrives, the customer service representative will need to determine, somehow, whether the QWR asserts only covered errors, only non-covered errors, or both covered and non-covered errors. If the QWR only asserts covered errors, the servicer must follow the extremely detailed requirements in proposed § 1024.35. If the QWR asserts only non-covered errors, we are concerned the servicer must follow the QWR response requirements. If the QWR asserts both covered errors and non-covered errors, the servicer would be required to apply QWR rules of § 6(e) and the proposed § 1024.35 and/or § 1024.36 procedures. This would require servicers to create a new, duplicative, and overlapping procedure, fully staffed, to manage the §§ 1024.35 and 1024.36 processes, in addition to the existing QWR procedures.

Determining when each procedure applies would be enormously difficult. In case of doubt, servicers would comply with each, which would be unreasonable from the consumer's point of view. The areas of overlap and differences will be fraught with mistake and confusion, for consumers, servicers, and examiners alike.

Another difficulty is that the proposal would prohibit the servicer from requiring additional information to respond to an error assertion.[29] This would be harmful to consumers in some cases. In § 6(k)(1)(C) and (D) matters, it could be especially harmful. If a consumer calls a servicer to verify why a payment was not posted and the servicer explains that it received no payment, the consumer needs to provide a copy of a cancelled check to the servicer, preferably right away. If the servicer cannot require a copy of the check, the consumer would be harmed. If the consumer asks how to avoid foreclosure, the servicer should be free to explain, for example, which items are missing from a loss mitigation application. The threat of liability should not cause servicers to hesitate to ask borrowers to submit relevant and reasonable materials.

In addition, under QWR requirements, the servicer does not need to provide the date of the correction. When correcting a covered error, the date of the correction is required.[30] This is not easy to define. If the error was a misapplied payment received on the first of the month, the borrower calls on the sixteenth, and the servicers reposts the payment on the sixteenth *as of* the first, which is the date of the correction? We cannot understand what problem the CFPB is attempting to resolve by requiring the date of correction, so it is difficult to suggest a clearer or more appropriate requirement with which servicers would know how to comply. We suggest the date of correction should not be required.

Another complication is that, when correcting a QWR, the servicer must send the borrower "a written notification of such correction" with the name and phone number of a person to call.[31] The Proposed Rule instead would require sending contact information, which may be an electronic address instead of a phone number.[32] Servicers would still need to send phone numbers because § 6(e) requires a phone number. In the information age, this may be

[29] Proposed § 1024.35(e)(2).
[30] Proposed § 1024.35(e)(1)(A).
[31] RESPA § 6(e)(2)(A).
[32] Proposed § 1024.35(e)(1)(A).

outdated, but servicers have no choice but to comply, and will continue to include phone numbers.

The Proposed Rule would not require a servicer to acknowledge receipt of an error assertion if the servicer corrects the error within five days and notifies the consumer of the correction "in writing."[33] The servicer would not need to acknowledge receipt of an information request if the servicer provides the requested information in five days, orally or in writing.[34] We support the proposal not to require acknowledgment of receipt in these circumstances, but would go further and not require acknowledgment of receipt in any case because it is unnecessary paperwork.

When a servicer responds to a QWR within five days, no additional notice to the borrower would be required,[35] but under the proposal, notice is always required when the servicer responds in five days.[36] While notice of significant matters is appropriate, the proposal would require notice that the borrower called or wrote to the servicer. This should be unnecessary because borrowers know when they initiate phone calls or write letters.

Recommendations

We urge the CFPB not to create a complex regime of oral requests for information and error resolution because such a regime is unmanageable and subjects the servicer to extreme risk and liability. We urge the CFPB not to strike § 1024.21 (QWR), but to instead treat those four items specifically identified by the Dodd Frank Act in § 6(k) as QWRs, but some with shorter timelines. We urge the CFPB not to expand the definition of a QWR beyond the four items identified in the Act.

We recommend that servicers be able to request reasonable information from borrowers in responding to QWRs and to other error assertions.

C. The Protections of RESPA Should Be Limited to Written Communications

The proposal would require servicers to comply with QWR procedures for both oral and written error assertions and information requests as stated earlier.

The QWR procedures are inherently inapplicable to oral communication. Congress was clear that when servicers are liable for sending acknowledgement notices and written responses, they are entitled to a written record so they can manage their compliance. Servicers are often not permitted to talk to consumers who are represented by counsel, so in those cases oral communication should not be required.

Consumers can always call a servicer to request information or assert an error, and servicers can and routinely do respond to oral communications. We certainly do not object to servicers taking and responding to oral requests. Rather, our objection is that treating oral

[33] Proposed § 1024.35(f)(1).
[34] Proposed § 1024.36(e).
[35] RESPA § 6(e)(1)(A).
[36] Proposed § 1024.25(f) (written notice); § 1024.36(e) (written or oral notice).

communications as QWRs would make compliance impossible or extremely difficult. Attaching liability to noncompliance when compliance is not reasonably possible is inappropriate.

To trigger the proposed tracking requirements and impose potential servicer liability, it is not unreasonable to require borrowers to put their complaints or requests for information in writing as Congress explicitly required. QWRs do not need to be elaborate of complicated. Both before and after a borrower submits a QWR, the borrower and servicer can call each other and resolve the issue orally. In fact, such oral communications is often quite helpful.

If the borrower is willing to expend a small effort to commit an error notice or information request to writing, then the servicer too should be obligated to perform in a prescribed manner. If the borrower does not wish to document the concern, however, then one should presume the issue was not sufficiently serious.

The Federal Trade Commission actively encourages consumers to put their communications in writing and provides a sample letter:

> If you have a dispute, continue to make your mortgage payments, but notify the servicer in writing (see Sample Complaint Letter) and keep a copy of your letter and any enclosures for your records.

HUD also provided a model form consumers can use. HUD directs consumers to attach any related written materials because often they are necessary, and it specifically acknowledges that the consumer may have already spoken to the servicer. That is, a consumer may call a servicer to report an error, and the servicer may require written materials to investigate. The CFPB's proposal would undo this sensible process by requiring servicers to investigate without relevant written materials.

Recommendation:

The final rules must not create a regime of oral requests. Servicers should only be liable under RESPA for non-compliance with the law if the borrower submits a request in writing.

We recommend the CFPB issue HUD's or the FTC's model QWR form because it would help consumers communicate with their servicers.

D. Dedicated Telephone Numbers Are Absolutely Necessary, but Do Not Address Fundamental Problems with Oral QWRs

While we appreciate the CFPB's proposal to permit a servicer to identify both a specific phone number and a specific address that borrowers must use to trigger the resolution timelines and liability,[37] this would be problematic in a regime of oral requests and would not address the fundamental problems servicers will encounter.

Small servicers find it prohibitive to create a dedicated, staffed phone number, to record all calls, and to provide the technology necessary to cross-reference calls with borrower's accounts. The volume of calls on these dedicated phone lines will be unmanageable for many servicers because borrowers will no doubt use them to ask routine questions that should not trigger QWR procedures.

While the CFPB does not require that all calls be recorded, to avoid litigation, it is highly likely that servicers will be forced to do so as the only means to provide evidence of compliance during examinations or to counter a plaintiff's claim in court. One significant problem is that some states do not permit recordings without the borrower's consent,[38] adding additional complexity to an oral process. Additionally, the ability to present employee notes or the servicer's written response to the borrower as evidence would depend on the rules of evidence. That is, servicers may not be able to protect themselves from liability for meritless claims if they cannot record all calls, or if they cannot introduce evidence. This places the servicer in an untenable position legally. It also makes compliance impossible – servicers would face litigation over alleged oral statements servicers cannot record.

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[37] Proposed §§ 1024.35(c) and 36(b).

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California	Cal. Pen. Code §§ 631, 632.
Connecticut	Conn. Gen. Stat. §§ 52-570d and 53a-187, *et seq*.
Delaware	11 Del.C. § 1335 (a)(4).
Florida	Fla. Stat. § 934.03(2)(d).
Illinois	720 I.L.C.S. § 5-14-2(a)(1) & 5-14-3(j).
Louisiana	La. R.S. § 15:1303(C)(4); *see also* LA P.S.C. Regulations, dated 7/10/2003, § V(A)(6).
Maryland	Md. Courts and Judicial Proceedings Code Ann. § 10-402(c)(3) (2003).
Massachusetts	A.L.M. G.L. ch. 272, § 99(B)(3) and (4) (2004).
Michigan	M.C.L.S. § 750.539a(2).
Montana	Mont. Code Anno. § 45-8-213(1)(c) and(2).
Nevada	N.R.S. § 200.620.
New Hampshire	R.S.A. §§ 570-A:1(III) and 570-A:2(I).
Pennsylvania	18 Pa.C.S. §§ 5703 & 5704(4) and (15).
Washington	Rev. Code Wash. (ARCW) §§ 9.73.030(1) and (3) (2004).

We understand that the CFPB wants consumers to be able to call servicers about servicing matters. However, that ability already exists. The costs of an oral QWR process are grossly disproportionate to the benefits to borrowers, who can continue to call customer service today.

The CFPB appears to presume that servicers universally ignore borrower's oral error assertions and information requests, so much so that an elaborate, costly, unworkable oral QWR process should be required. This is far from the truth. The reality is that servicers perform these duties accurately and timely in the normal course of every business day. The vast majority of borrowers do not seek acknowledgement that they made a request or that they called a servicer because they know that. Nor do they seek documentation of the results of their calls because they usually just want to confirm a simple fact, such as a current balance, that a payment was received, the address or process to send additional payments, and the like. Continuing with the statutory definition of QWR does not prevent or interfere with consumers' ability to call or walking into a branch with a question and get a resolution.

Under any scenario that penalizes a servicer for failing to identify an *oral* covered error or information request would necessitate extreme safeguards in communications with borrowers. This would greatly interfere with borrowers' customer service experience. Customer service personnel would no longer be able to simply answer routine questions given the extreme penalties for failing to comply with the requirement. Rather, in an oral QWR process, servicers would have to ask all callers whether they are asserting a "covered error" or "request for information" before any substantive communication transpires. Consumers do not know what a "covered error" is. When the answer is yes, the borrower would have to be transferred to a dedicated line. The servicer would not be able to let the borrower "transfer out" from the dedicated line and its interactive voice response system, to prevent untrained staff from failing to identify a covered request.

Servicers would have to designate a Post Office box to prevent a borrower from walking into a branch location and making a oral covered request of an employee not trained in determining whether §§ 1024.35 and 1024.36 have been triggered. Other more complicated processes may have to be set up in branches that would route in-person communication to dedicated phone lines as well.

Recommendation

We recommend limiting the error assertion and information request procedures to valid, qualified requests that are written. Oral QWRs, with the impossibility of proving the content of oral communications, would put servicers in a position of requiring costly recording of all calls to a dedicated line. Some servicers cannot afford this, and in some cases, recording is illegal. Servicers have no way of protecting themselves from liability for meritless claims that a borrower said something orally to a servicer. We strongly urge the CFPB to abandon the proposal to create QWR liability for oral communications and honor the statutory QWR definition, as Congress directed.

If the Bureau upholds this proposed rule, we agree and support the ability to create a dedicated phone and mailing address for notices of complaints. As cited earlier, these are critical for servicers to manage their compliance requirements. If the CFPB does permit oral QWRs, it should permit servicers to establish more than one dedicated phone number or address for different purposes.

E. 60-Day Ban on Credit Reporting Would Harm Consumers

Currently, RESPA provides:

> During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined in section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a).[39]

The CFPB proposes to prohibit reporting adverse information to a consumer reporting agency for 60 days after receipt of an assertion of covered error, regardless of whether it relates to "the borrower's payments[.]"[40] The CFPB explains:

> RESPA section 6(e) sets forth this prohibition on servicers with respect to a qualified written request that asserts an error. Proposed § 1024.35(i)(1) would implement Section 6(e) of RESPA with respect to qualified written requests. The Bureau proposes to maintain the 60-day timeframe set forth in section 6(e)(3) of RESPA. Even though a notice of error may be resolved by no later than 45 days pursuant to proposed § 1024.35(e)(3)(ii), the Bureau believes that the 60-day timeframe is appropriate in the event that there are follow-up inquiries or additional information provided to the borrower.[41]

We strongly oppose this broad expansion of the ban on negative credit reporting. The proposal would not merely implement § 6(e)(3), it would vastly expand it. It would apply:

- To all assertions of covered errors, not just those that are valid QWRs.
- To overbroad or unduly burdensome notices of error, duplicative notices of error, and untimely notices of error.
- Regardless of whether the alleged error is related to the borrower's payments.
- Even if the servicer responded before the 45 day deadline that the borrower's allegation was inaccurate.

The CFPB does not address the fact that its proposal would prohibit negative credit reporting in cases where the error assertion is unrelated to "the borrower's payments[.]" It provides no reason for this expansion. It would prohibit negative reporting when the error asserted is, for example, the servicer's failure to pay insurance premiums from an escrow, which is unrelated in this case to the borrower's payment and would not affect the consumer's credit report.

** RESPA § 6(e)(3).
[40] Proposed § 1024.35(i).
[41] 77 Fed. Reg. 57200, 57231 (September 17, 2012), Preamble.

Moreover, by banning adverse credit reporting on requests that are overbroad and unduly burdensome, duplicative, or stale, the proposal would support the very abuses Congress sought to stop. Creditors rely on the accuracy of credit reports to make appropriate lending decisions. From historical experience, we know that some consumers will use the ban on credit reporting to remove adverse, but accurate, credit information to refinance a loan with an unsuspecting lender that does not have knowledge of the previous delinquencies. This is an inappropriate use of the ban. Those who use credit reports would need to protect themselves by assuming that a consumer who has a mortgage for which no recent information has been reported or for which data is missing is a high credit risk. This will hurt consumers in many cases. For example, underwriting requirements for loan transactions require that mortgage payments be made on time for 12 consecutive months; loss mitigation options may require consecutive payments; and the suppressed reporting may adversely affect the loss mitigation options available to a borrower. This is why servicers are required to have policies and procedures to ensure the accuracy and integrity of information they report.[42]

The Settlement Agreements require servicers to promptly correct not only account errors, but also "inaccurate reports to consumer credit reporting agencies."[43] Servicers subject to the Settlement Agreements would be in violation if they were to make a practice of broad non-reporting because it would constitute "inaccurate reports[.]" The rule will need to exempt the servicers subject to those Agreements from the broad ban on credit reporting. It would be fairer to treat all servicers this way.

Recommendation

The ban on adverse credit reporting should be limited to valid QWRs that relate to payment application or payoff disputes. It should be limited to the amount of time the servicer takes to respond. Reporting should resume and be retroactive if no error occurred. A ban on negative credit reporting should not occur when one of the conditions found in 1024.35(g) exists.

F. Exemption for Overbroad or Unduly Burdensome Error Assertions or Information Requests Need Clarifications

The CFPB proposes that servicers need not comply with the error resolution procedures when:

- The servicer "reasonably determines" the error assertion is overbroad, duplicative, or untimely.[44]
- To the extent the servicer "can identify a valid assertion" of a covered error in an overbroad or duplicative error assertion.[45]

The CFPB proposes that servicers need not supply information requested when:

- The servicer "reasonably determines" that the request is duplicative, overbroad or unreasonably burdensome, or untimely.[46]

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[42] 12 C.F.R. § 1022.42.
[43] Settlement Agreements Appendix A ¶ I.B.8.
[44] Proposed § 1024.35(g)(1).
[45] Proposed § 1024.35(g)(1)(ii).
[46] Proposed § 1024.36(f)(1)(i), (iv), and (v).

- The servicer reasonably determines the request is for confidential, proprietary, general corporate, or irrelevant information.[47]

The proposed Commentary provides additional clarity on what is overbroad or unduly burdensome.

We fully support an exemption for abusive QWRs error assertions and information requests. The industry has been plagued by these abusive requests for many years. They consume large amounts of staff time and take away from legitimate business obligations. Unfortunately, the current exemption is problematic because it requires servicers to determine if, within these abusive QWRs, there is a "proper assertion of a covered error in a notice of error that is otherwise overboard or unduly burdensome."[48] Moreover the preamble states that the servicer assumes the liability for inaccurately determining that a request is overbroad and unduly burdensome. These conditions effectively subsume the exemption.

Recommendation

Servicers should not be required to parse out what is or could be a valid requirement within an overbroad and unduly burdensome request. If the document is overbroad and unduly burdensome all requirements associated with responding to "covered requests" should be eliminated. The servicer would send a notice to the borrower indicating that the servicer determined that the request was overbroad or unduly burdensome and will not respond to the specific allegation or request; at which point the borrower could, if it had a relevant error or information request, resubmit it.

For additional clarity, we also recommend revising § 1024.36(f)(1)(iii) as follows:

> "The borrower requests information that is not directly related to servicing the borrower's mortgage loan account during a period when the requestee serviced the loan."

G. Error Asserted Before Foreclosure Sale

Proposed § 1024.35(f)(2) states:

> A servicer is not required to comply with the requirements of paragraphs (d) and (e) of this section if the servicer receives a notice of an error in paragraph (b)(9) of this section *seven days or less* before a scheduled foreclosure sale, so long as prior to the scheduled foreclosure sale, the servicer responds to the borrower, orally or in writing, and corrects the error or states the reason the servicer has determined that no error has occurred.[49]

This would create a significant window for abuse by allowing a borrower to orally claim, accurately or otherwise, hours or even minutes before a scheduled foreclosure sale, to have

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[47] Proposed § 1024.36(f)(1)(ii) and (iii).
[48] 77 Fed. Reg. 57200, 57236 (September 17, 2012) Preamble.
[49] Proposed § 1024.35(f)(2) (emphasis added)

submitted an application package. By making a claim so close to the foreclosure sale, it is almost certain that the servicer will be unable to respond timely, and would have to stop the sale or risk violating RESPA. Abuses of this type are inappropriate.

Servicers who receive legitimate error assertions before foreclosure have a duty to look into them and stop a foreclosure when appropriate. However, the proposal would go much farther and enable borrowers to assert errors that have no bearing on the propriety of a foreclosure and suspend the foreclosure.

By the time a loan is scheduled for foreclosure, the borrower has had ample time to cure the default and assert errors. Nonetheless, we understand the urgent needs of borrowers in foreclosure and thus we suggest an alternate timeline that is fair to both parties. Borrowers who submit requests in writing alleging that a complete loss mitigation application is pending should be permitted to do so up to three days (excluding Saturday, Sunday and holidays) before a foreclosure sale. This would not bar consumers from availing themselves of other remedies at law for an inappropriate foreclosure. We are merely suggesting that servicers would not have a QWR RESPA violation.

It is also important to realize that some courts will not cancel a foreclosure sale a specific number of days before the foreclosure sale date. In addition, Freddie Mac can, and occasionally does, override a servicer's request to postpone or cancel a foreclosure sale. Section 66.5 of Freddie Mac Servicer Guide establishes Freddie Mac's right to "direct and manage the actions taken by the foreclosure counsel or trustees, on a case-by-case basis or individual State basis." If Freddie Mac were to exercise this option, the servicer should not be held responsible for non-compliance with Regulation X, and should not incur administrative penalties or be subject to private rights of action. The provision, therefore, creates a conflict between the servicer's contract with Freddie Mac and the Proposed Rule. This situation is a perfect example for why the CFPB needs a mechanism for resolving contractual, regulatory, and statutory conflicts.

Recommendations

QWRs that allege a complete loss mitigation application is pending and thus foreclosure should not occur should receive expedited review, but servicers must have an absolute deadline for receipt of these requests after which time they are not liable under RESPA.

The regulation should explicitly exempt servicers from liability when an investor or a legal requirement required the servicer to continue with a foreclosure.

H. Providing Copies of Documents Relied on to Correct Errors Is Too Broad and Is Not Subject to a Reasonableness Standard

The Proposed Rule would require servicers to provide, at no charge, "copies of documents and information relied upon by the servicer in making its determination" about an error within 15 days of a request.[50] The Dodd-Frank Act does not require this process nor does it contemplate

[50] Proposed § 1024.35(e)(4).

anything similar. We object to this requirement because it is not subject to a reasonableness standard, would be unduly burdensome, would reach confidential materials, may not be possible to comply with, and it is unclear. It would be a “back-door discovery process” rather than a consumer protection.

This proposal would require the servicer to produce at no charge what could be a large volume of materials, with no reasonableness standard. This could impose costly compliance burdens in cases of assertions of very minor errors, which may or may not have occurred.

It is unlimited in the amount of materials it would cover. For example, one reading of this proposal is that the servicer would be required to produce what the consumer can get elsewhere for free. It would reach materials that are proprietary, confidential, privileged, trade secrets, or that are used to prevent fraud or information security breaches. While we are pleased that the proposed definition of covered error in § 1024.35(b) does not incorporate the “back door discovery” about which we commented in response to the SBREFA outline, this proposal would have the same problem. Judicial discovery has the benefit of being overseen by a neutral judge to decide what is reasonable and relevant, while this proposal does not. This would be unduly burdensome.

The ability to determine what documentation must be provided is also problematic. If a borrower intended an extra payment to be deposited in escrow, but it was applied to principal or the next month’s payment, the servicer would simply repost the payment, relying on the consumer’s request, without regard to whether the consumer followed the stated procedures for directing overpayments. If the servicer provides a monthly statement, the correction would appear on the next monthly statement. We believe that such evidence should be sufficient. Moreover, we believe that servicers should be permitted to respond to the borrower that the payment allocation has been corrected as sufficient evidence. It is unclear whether the proposal would require more, such as screen prints or other documentation to comply. The value of the information in each case is the same, but the latter (e.g., producing screen prints) would impose addition burdens and costs on the servicer that are unnecessary. The screen shots would not be understandable to borrowers not trained to understand the servicer’s technology system.

To illustrate another example, if the asserted error was that a payment that was received and processed by machine was not posted timely, but the servicer had no errors or shutdowns in its electronic payment processing the day the payment was posted, the servicer knows the payment was posted the day it arrived. Must the servicer provide records that the payment processing system was operating correctly? Clearly providing this level of information is unduly burdensome on the servicer and would not be decipherable to the borrower. If the servicer relies on its electronic servicing system to indicate when and whether a payment was received, we believe a statement of such fact should be sufficient documentation.

<u>Recommendations</u>

We strongly recommend removing proposed § 1024.35(e)(4). At a minimum, it should:

- Never require disclosure of information that is proprietary, confidential, privileged, a trade secret, or that is used to prevent fraud or information security breaches.

- Permit servicers to limit the amount of information supplied to a reasonable amount, taking into consideration the substance and significance of the error asserted and any error that existed.
- Not require compliance if the request for such documents would be duplicative, overbroad, unduly burdensome, or untimely within the meaning of § 1024.35(g), because servicers have a statutory right not to comply with invalid requests free of charge.[51]

IV. Lender-Placed Insurance (Section 1024.37)

The Proposed Rule addresses the Dodd-Frank Act's requirements for lender-placed insurance ("LPI"), specifically the timing and content of the borrower notices, the termination of lender-placed insurance and refunds, and what constitutes confirmation of coverage.

The Proposed Rule also includes additional requirements not dictated by the Dodd-Frank Act, including providing borrowers with a good-faith estimate of the lender-placed insurance premium and requiring servicers to advance from an escrow account hazard insurance premiums even if the borrower is delinquent (discussed above).

The Proposed Rule also would clarify certain areas. Specifically, we support and appreciate the CFPB's proposal to:

- Continue to exclude open-end lines of credit from the LPI requirements of Regulation X;
- Exclude from the definition of lender-placed insurance, flood insurance required by FDPA;
- Clarify that the effective date of a lender-placed insurance policy dates back to the date of lapse of borrower-purchased coverage and indicate that the servicer may charge for this period when there is no duplicative coverage.
- Reiterate the Dodd-Frank Act exclusion from the need to determine whether charges are bona fide and reasonable if such charges are subject to state regulation as the business of insurance or charges are authorized by the FDPA.

A. Sufficient Demonstration of Coverage Must Include Key Policy Information

The Dodd-Frank Act requires a servicer to "accept any reasonable form of written confirmation from a borrower of existing insurance coverage, which shall include the existing insurance policy number along with the identity of, and contact information for, the insurance company or agent or as otherwise required by the Bureau of Consumer Financial Protection."[52]

According to the Proposed Rule, the CFPB would require that servicers include in their warning notices to borrowers, "a statement requesting the borrower to promptly provide the servicer with

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[51] RESPA § 6(k)(1)(B).
[52] Dodd-Frank Act § 1463, RESPA § 6(l)(2).

the insurance policy number, and the name, mailing address and phone number of the borrower's insurance company or the borrower's insurance agent[.]"[53] The CFPB is silent on whether additional information can be included in these notices if not specified by rule. As stated in our SBREFA letter, several problems exist with requiring such minimal information.

We continue to believe that the Dodd-Frank Act quoted above with regard to "reasonable confirmation of insurance," does not prohibit servicers from continuing the current practice of requiring a *declarations page or other evidence of insurance.* Rather, the Dodd-Frank Act requires that *in addition* to typical documentation necessary to confirm insurance, such confirmation of insurance must include the policy number and agent or insurer's contact information. A declarations page and other evidence of insurance provide the standard information that is necessary to confirm the borrower-purchased insurance, and has been permissible or encouraged for decades by the bank regulators, Fannie Mae,Freddie Mac, and other government agencies.

The GSEs' Uniform Security Instruments used throughout the industry contractually entitle servicers to require such evidence:

> If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices.[54]

There is no reason to believe the Dodd-Frank Act overruled agency standards and contractual obligations of the parties. Rather the Dodd-Frank Act should be read to add to existing standards a requirement to deliver the name and contact information of the insurance agent or company. The recently passed Flood Insurance Reform and Modernization Act defines "sufficiency of demonstration" to require servicers to accept "…from the borrower *an insurance policy declarations page* that includes the existing flood insurance policy number and the identity of, and contact information for, the insurance company agent."[55] (Emphasis Added).

Under the Dodd-Frank Act language, consumers would simply need to indicate to their insurance agents where the declarations page or other evidence should be sent. Insurance agents are familiar with how to meet servicers' requests for documentation of insurance and are, therefore, already in position to provide the servicers with the documents. Also, because the agent or borrower will have provided the agent's contact information, the servicers can call the agent directly to correct any deficiency in the information or coverage once received and thus can avoid delays at that stage.

Under investor guidelines and other requirements that the Dodd-Frank Act did not repeal, servicers today accept as proof of hazard and wind coverage a copy of a declarations page, certificate of insurance, or copy of the insurance policy which identify the named insured, insured property address, coverage amount, date of coverage, deductible amounts, and the named mortgagee. Similar, but not identical, evidence is the information necessary to actually confirm the sufficiency of the borrower's existing coverage, and is required for flood insurance

[53] Proposed § 1024.37(c)(2)(vii).
[54] Fannie Mae/Freddie Mac Uniform Instrument, Covenant 5 (Form 3005 1/10).
[55] Public Law 112-141; Title II, § Section 100244(a)(3), p. 562.

policies.[56] [57] Obtaining this evidence is important because this is the information the servicer needs to pay a renewal premium. It is also the reasonable basis the servicer needs to establish replacement value in the event the servicer must lender-place insurance.

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[56] *See, e.g.,* the following Comptroller and FEMA guidance:
"Evidence of Insurance: The National Flood Insurance Program does not recognize an oral binder or contract of insurance. A copy of the flood insurance application, premium payment, and declarations page submitted to the lender is sufficient evidence of proof of purchase." Comptroller's Handbook – Flood Disaster Protection, (May 1999), p. 47.

"Acceptable proof of coverage may be a copy of the Flood Insurance Application and premium payment, or a copy of the Declarations Page. The NFIP does not recognize binders or certificates of insurance." FEMA, Mandatory Purchase of Flood Insurance Guidelines, (Sept. 2007). p. 26.

"As a condition of making, increasing, extending, or renewing a loan on the residential condominium unit and as frequently as required, a mortgagee must obtain:

- A copy of the RCBAP [Residential Condominium Building Association Policy] documenting the amount of insurance—ideally, insured at RCV, or at least the unit's portion equaling the statutory requirement. (Effective October 1, 2007, the Declarations Page of each RCBAP issued or renewed must show the building's replacement cost value and the number of units within that building); or
- A copy of the RCBAP and Dwelling Form (or application and paid receipt) jointly equaling at least the minimum statutorily required amount of insurance; or
- A copy of the Dwelling Form equaling the minimum amount required to meet statutory requirements.

FEMA, Mandatory Purchase of Flood Insurance Guidelines, (Sept. 2007) p. 46.

"D. Evidence of Insurance: A copy of the Flood Insurance Application and premium payment, or a copy of the declarations page, is sufficient evidence of proof of purchase for new policies. The NFIP does not recognize binders. However, for informational purposes only, the NFIP recognizes certificates or evidences of flood insurance, and similar forms provided for renewal policies if the following information is included;

1. Policy Form/Type (GP, DP, RCBAP, PRP)
2. Policy Term
3. Policy Number
4. Insured's Name and Mailing Address
5. Property Location
6. Current Flood Risk Zone
7. Rated Flood Risk Zone (zone used for rating, including when grandfathering or issuing coverage under the 2-year PRP Eligibility Extension)
8. Grandfathered: Y/N
9. Mortgagee Name and Address
10. Coverage Limits; Deductibles
11. Annual Premium

*For RCBAP, include the number of units and Replacement Cost Value (RCV) of the building.

FEMA, Flood Insurance Manual, (May 1, 2012), p. GR 15.

[57] While flood insurance required by the FDPA is excluded from the CFPB's proposed definition of lender-placed insurance, agency requirements regarding the sufficiency of evidence for flood insurance are relevant as CFPB interprets the Dodd-Frank Act and appropriate existing standards.

Confirmation of insurance need not come directly from the borrower, but could and would most likely come from the insurance agent. As a result, the cost to the borrower of providing this information is zero or close to zero because the insurance agent will mail or electronically transfer the documentation. The borrower is not likely to incur the cost of a telephone call as most insurers have local or toll-free numbers. In contrast, the risk and cost to the borrower for delaying the servicer's receipt of the information is significant. Waiting for the borrower to send or call with the name of the agent or policy numbers before any action is taken will delay getting the verification necessary to stop the lender-placed insurance cycle.

The approach in the Proposed Rule creates a number of problems. First, requiring borrowers to provide only a policy number and contact information does not permit the servicer to comply with other agencies' guidance.

Second, importantly for consumers, the minimal information requested does not demonstrate that a borrower has maintained necessary insurance on the property. The policy number provided may be that of a lapsed policy, and the contact information provided may be the name of an agent pulled from the cover of a dated telephone book. In contrast, the declarations page or certificate of insurance that servicers and regulators generally require accurately establishes whether the borrower's policy is active and provides appropriate coverage. The approach in the Proposed Rule increases the risks of having to lender place insurance.

Third, the borrower in some cases is the only link to critical pieces of information necessary to verify if the appropriate amount of borrower-purchased insurance is in place. This is especially true with insurance on condominiums, where the borrower may be the only means by which the servicer can determine the condominium project-level insurance and the number of units (which allows the servicer to determine sufficiency of insurance for the particular unit). The condominium association need not respond to the servicer, but has a responsibility to respond to the borrower, as unit owner. A prohibition on getting the borrower involved early in the lender-placed cycle would result in more lender-placed insurance being imposed.

Fourth, as stated earlier, the borrower is responsible pursuant to the mortgage contract to provide the servicer with required evidence of payment of insurance.[58] The Proposed Rule would interfere with valid contracts nationwide.

Fifth, the CFPB's interpretation would put unnecessary financial and resource strains on servicers to track down specific policy information for hundreds of thousands of borrowers by transferring to the servicer the obligation the borrower agreed to perform under the mortgage or deed of trust. If the borrower has a business relationship with an insurance agent or broker and has a contractual obligation to maintain insurance, it is perfectly reasonable for the borrower to call the agent or broker and request that a declarations page be sent to the servicer. Requiring servicers to obtain the necessary information would also have the additional unintended consequences of putting servicers in jeopardy of noncompliance with certain aspects of the Dodd-Frank Act, chiefly, the requirement that lender-placed polices be terminated, and refunds paid to the borrowers within 15 days. In contrast, the current process is simple, efficient, takes little borrower effort, and avoids unnecessary lender-placed insurance.

[58] See Fannie Mae and Freddie Mac Uniform Security Instrument.

Sixth, CFPB's consumer testing revealed that borrowers who receive lender-placed insurance warning letters would often immediately call their insurance agent to avoid lender-placed insurance.[59] Given this research, it is clear that borrowers will be in contact with the insurance agent early in the process (earlier than the servicer) and are in the best position to ask the insurance agent to send the declarations page or certificate of insurance to the servicer. The warning letters should be allowed to identify what the consumer should request of his insurance agent and where to send such confirmation of insurance. Failure to get the borrower to communicate to the agent the need for the declarations page/certificate of insurance early in the process will cause inevitable delays in verifying sufficiency of borrower-purchased coverage.

Recommendations

While it is critical that the CFPB retain its proposal that servicers can lender place insurance if verification of sufficient borrower-purchased insurance is not obtained, we urge the CFPB to expressly state in the rule that servicers can require borrowers to provide verification information, in addition to the policy number and the agent's or insurer's contact information. Servicers should be permitted to comply with agency and investor requirements and applicable legal and safety and soundness standards by permitting them to verify insurance in any reasonable manner.

Warning letters should be allowed to identify the documentation the consumer should request of the insurance agent and where to send such confirmation of insurance.

B. Servicers May Be Unable to Provide "Good-Faith Estimates"

The CFPB intends to expand the content of lender-placed insurance notices to require that servicers provide a "good-faith estimate of the cost of lender-placed insurance premiums the borrower may be charged."[60] This proposed requirement is of significant concern to our members.

First, it is unclear whether servicers have the legal authority and capacity to provide good faith estimates. We are concerned with the use of the phrase "good faith estimate." In Regulations X and Z, that phrase imposes cost tolerances that cannot be exceeded. To provide a binding estimate, an insurance binder would be required. This must come from a licensed insurance agent or carrier, not a servicer. Imposing a requirement to obtain insurance binders for the warning letters would be excessive.

Second, even without binding tolerances, some servicers, especially smaller servicers that perform their own tracking of insurance lapses and cancellations, do not have the information necessary to make good-faith estimates of insurance premiums. Servicers are not privy to the insurer's pricing formulas and do not have access to the cost until the policy is issued.

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[59] 77 Fed. Reg. 57200, 57242 (September 17, 2012) Preamble.

[60] Proposed § 1024.37(c)(2)(ix).

Third, we are concerned about the customer service impact of providing consumers estimates that turn out to differ significantly from the actual cost of insurance. We are concerned with servicers' UDAP and UDAAP liability from disparities between estimated and actual costs, especially given the difficulties of producing accurate estimates of third-party charges.

Fourth, the primary value in providing the good faith estimate of cost is notification that the lender-placed insurance policy will be more expensive than a policy the borrower could obtain directly. However, this notification is already provided by one of the additional disclosures that the CFPB is proposing to include in the notices, which states that the lender-placed insurance may "cost significantly more than hazard insurance obtained by the borrower."[61]

Fifth, the Settlement Agreements do not require estimates of insurance premiums. They instead rely on a required disclosure that "the cost of such [lender-placed] coverage may be significantly higher than the cost of the homeowner's current coverage[.]" [62] This too is consistent with proposed § 1024.37(c)(2)(x).

As a final matter, it is not clear whether the CFPB tested with consumers a model notice which included a statement that LPI premiums would likely be higher than borrower purchased insurance. When lender-placed insurance is obtained, the problem is not that borrowers mistakenly believed that lender-placed insurance is similarly priced to insurance they can purchase on their own, it is the fact that voluntary carriers are unwilling to insure the borrower or the borrowers fail to heed the multiple notices that servicers send.

Recommendation

We urge the CFPB not to require that servicers estimate the cost of insurance, but instead issue warning letters that disclose that the cost could be higher. Such a requirement would also alleviate the burden placed on smaller servicers who typically produce the warning letters in-house and do not have access to the carriers' rate schedules.

If the CFPB proceeds with requiring good faith estimates, small servicers should be exempt from estimating LPI premiums.

C. Content of Borrower Warning Letters and Timing

The Proposed Rule calls for three substantively different letters: The first or initial letter would be relatively standardized. The second letter must be semi-customized based on whether the borrower provided the policy number and agent's contact information and only the verification of insurance coverage was outstanding or the borrower provided no information at all. That means the second letter would be one of two different letters. Today, there is one letter sent twice. The Settlement Agreements similarly require one letter sent two times.[63]

[61] Proposed § 1024.37(c)(2)(x)(A).
[62] Settlement Agreements Appendix A ¶ VII.A.3.a.v.
[63] Settlement Agreements Appendix A ¶ VII.A.3.b.

First and foremost, because borrowers are responsible for ensuring verification of insurance was delivered to the servicer, as the mortgage contract requires, there should be no need for differing letters.

The letters should be combined to avoid significant complications, customization, and unnecessary cost and risk of error by the servicer. This would also alleviate compliance burdens for small servicers. Both rounds of letters are intended to elicit the same response, which is to call the insurance agent or servicer to avoid lender-placed insurance. We believe a combined MS-3(B) and MS-3(C) letter would achieve this goal. We suggest the following combined language:

> This is your second and final notice that our records show that your [hazard][insurance type] insurance [is expiring][expired], and ~~we~~<u>either (1) we</u> do not have ~~evidence~~ <u>verification</u> that you have obtained new coverage <u>or (2) we received the insurance information you provided but we are unable to verify coverage from</u> <u>[Date Range].</u>

The letter can then state "please provide us with insurance information for [Date Range] immediately," which encourages the borrower to contact his agent or the servicer for more information.

We recommend using the term "verification" rather than "evidence" because verification is what is required and because it would be consistent with the term used repeatedly in proposed § 1024.37. We recommend making the same change in § 1024.37(c)(2)(v) for the same reason.

We encourage the CFPB to permit the servicer to describe in the warning letters what verification of insurance is required. The Settlement Agreements require the notices to include "A clear and conspicuous statement of the procedures by which the borrower may demonstrate that the borrower already has insurance coverage[.]"[64] This needs to be permissible under the CFPB's rule.

Many servicers provide far more information today than what is being proposed by the CFPB in its model disclosures, including for example, information needed to confirm or verify coverage, the variety of ways to get specific information to the servicer, required disclosures and other statements, such as compensation earned, that have become necessary to avoid consumer-based litigation. We urge the CFPB to indicate that the model disclosure form can be adjusted to provide more information or be altered to comply with state and legally required disclosures. A mandate to issue the exact model form would put servicers in conflict with existing state laws, common law, and litigation settlements. Moreover, such a mandate would limit critical information currently provided to consumers and would be at odds with the stated objective of better information and transparency for borrowers.

The Proposed Rule provides that a servicer must stop the second letter from being sent if the servicer receives the required information and verification more than five days prior to the

[64] Settlement Agreements Appendix A ¶ VII.A.8.3.a.iii.

mailing date.[65] We believe this is highly problematic because many servicers use third-party vendors to issue the letters. Five days is insufficient to communicate and withdraw letters with these third-party vendors. We recommend 10 days (excluding Saturday, Sunday and holidays) from *receipt of the verification of proper insurance*. Without this revision, the Proposed Rule would be highly error prone, resulting in a private right of action with statutory damages in situations where no harm to the borrower occurred by the mailing of an extra letter.

Recommendations

We recommend permitting servicers to describe what verification the servicer requires.

We strongly recommend using the same form of letter for all notices under § 1024.37(c), (d) and (e).

We request more time to remove letters from production upon receipt of verification of coverage.

D. Renewal and Replacement Notices

The Proposed Rule would require servicers to provide a renewal or replacement notice.[66] Also, servicers would be prohibited from charging a borrower for renewing or replacing pre-existing lender-placed insurance unless: (1) the servicer delivers or places in the mail a written notice to the borrower with specified disclosures at least 45 days before the premium charge or any fee is assessed;[67] and (2) during the 45-day notice period, the servicer has not received evidence that the borrower has obtained hazard insurance.[68] Once again, the disclosures would have to include the cost of the insurance (or a good faith estimate) and statements to the effect that the servicer has previously obtained the insurance, charged the borrower for the insurance, and the servicer has the right to maintain the insurance.[69] The Proposed Rule also provides certain formatting requirements for the disclosure.[70]

It is common industry practice for servicers to send renewal notices to borrowers. Such notices are often sent more than 45 days in advance of the renewal date, which we believe is permissible under the Proposed Rule.

However, it is more difficult to produce notices of replacement insurance 45 days before the premium is charged or assessed. This will be especially problematic if Fannie Mae reissues Announcement SVC 12-04 to require changes to the insurance policies. If that occurs, it is likely all previous lender-placed policies will have to be cancelled and reissued en mass. Servicers will have to notify borrowers of the change and the new policy. As proposed, accounts could not be charged for 45 days. Servicers should not be subject to the 45-day waiting period for replacement policies. In addition, some of the required content of the notice

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[65] Proposed § 1024.37(d)(4).
[66] Proposed § 1024.37(e).
[67] Proposed § 1024.37(e)(1)(i).
[68] Proposed § 1024.37(e)(1)(ii).
[69] Proposed § 1024.37(e)(2).
[70] Proposed § 1024.37(e)(3).

does not appear applicable in the case of a replacement policy (e.g., notice that the insurance is expiring).

Recommendation

We reemphasize our concerns with the Proposed Rule that estimates of premiums be provided.

We also request that the 45-day waiting period not apply to replacement policies.

E. Effective Date of a Lender-Placed Policy

We fully support the CFPB's proposal that allows servicers to charge for insurance for the 45-day notice period. In effect, this allows servicers to lender place insurance with an effective date back to the date of lapse or cancellation of the previous policy.[71] This is critical to ensure there is no gap in insurance as required by the GSEs and other agencies. If evidence of duplicate insurance is provided at a later date, the lender-placed premiums would be refunded for any duplicative coverage period. This is consistent with current industry requirements, investor requirements, and the recently enacted Flood Insurance Reform and Modernization Act.[72] In order to avoid potential questions, we suggest that Proposed Comment 37(c)(1)-1 be made more explicit about the time period for which force-placed insurance may be purchased, Our recommendation is below.

We seek a correction to Comment 37(c)(1)(iii)-1, which provides examples of a borrower having hazard insurance coverage continuously in place. Unfortunately that example is not accurate and must be adjusted: Comment 37(c)(1)(iii)-1 states:

> When there is a grace period, § 1024.37(c)(1)(iii) requires the servicer to take the grace period into account when determining whether the borrower has hazard insurance in place continuously. For example, a borrower's prior hazard insurance might have an expiration date of June 1, but a grace period extends the effectiveness of the borrower's prior hazard insurance to June 10. Accordingly, so long as the borrower obtains hazard insurance, effective June 11, then the borrower has hazard insurance in place continuously.

It is important to recognize that the insurance would not be effective from June 1 - 10 *unless* the borrower reinstated its insurance policy with the existing carrier or a new carrier dating back to June 1. An example will illustrate this distinction. Assume the policy lapsed on May 31. The original insurer would not pay a claim for damage occurring during a grace period, in this case between June 1-10, if the borrower did not renew its insurance policy within the grace period, but rather began insuring the property with a different carrier starting June 11. We suggest corrective language below.

We seek clarity with regard to § 1024.37(e)(1)(iii), which allows servicers to *charge* for LPI *during* the 45-day notice period in the case of renewals and replacement of existing LPI.

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[71] Proposed § 1024.37(d)(2)(f).
[72] Pub. L. No. 112-141.

Without the clarification below the language implies that servicers would not be able to place and charge for insurance until after the 45-day waiting period and only if the borrower provided evidence of borrower-purchased insurance.

Recommendation

In order to avoid potential questions, we suggest that Proposed Comment 37 (c)(1)-1 be made more explicit about the time period for which lender-placed insurance may be purchased, such as:

> If not prohibited by State or other applicable law, the servicer may retroactively charge a borrower for lender-placed insurance ~~obtained during the 45-day notice period~~ for the period beginning on the date the borrower no longer had continuous insurance coverage.[73]

We seek correction of an error in Comment 37(c)(1)(iii)-1 which provides examples of a borrower having hazard insurance coverage continuously in place. We suggest the following revision to the commentary:

> Accordingly, so long as the borrower obtains hazard insurance by June 10 with an effective date back to June 1**,** ~~June 11,~~ then the borrower has hazard insurance in place continuously.

Also for clarity, we recommend the following adjustment to § 1024.37(e)(1)(iii):

> *Charging a borrower before end of notice period.* Notwithstanding paragraphs (e)(1)(i) and (e)(1)(ii) of this section, a servicer that has renewed or replaced existing force-placed insurance during the 45-day notice period may charge the borrower before the expiration of the 45-day notice period for the renewal or replacement promptly after the servicer receives, during the 45-day notice period, the verification that hazard insurance obtained by the borrower did not provide the borrower with insurance coverage for any period of time following the expiration of the existing force-placed insurance.

We reiterate the need to remove the 45-day waiting period on replacement policies.

F. Protecting the Borrower's Interest

The CFPB requests comment on whether the condition in § 1024.17(k)(5) should be adjusted to require that the lender-placed insurance policy protect the borrower's interest. We believe the CFPB's proposal as written is sufficient and no express requirement that LPI protect the borrower's interest is necessary due to current industry practice and need.

Generally today, servicers require insurance to protect the borrower's interest, not just the unpaid principal balance ("UPB") of the loan. To achieve this, servicers insure to the

[73] Proposed Comment(c)(1)-1.

replacement cost of the home. Replacement cost coverage ("RCV") is required for borrower-purchased hazard insurance purchased at origination as well, and is the standard practice today throughout the life of the loan. Replacement cost coverage is critical to ensure that borrowers have sufficient funds to rebuild their homes. If only the UPB were covered, borrowers would be subject to reduction in their claim amounts for (1) losses beyond the UPB, (2) for the actual cash value of the damage (e.g., depreciated value), and/or (3) co-insurance amounts. These claim limitations would apply regardless of whether the policy was borrower-purchased or lender-placed if the property was only insured to UPB. This is why lenders and government agencies today favor RCV coverage. It is important to note, however, that in some situations, the servicer will not be able to determine if the last known coverage maintained by the borrower was at replacement cost of the structure and it would default to providing lender-placed insurance for the UPB of the loan. As a result, servicers must have the capacity to apply both options.

Recommendation

There is no need to expressly provide that borrowers' interests should be protected in lender-placed insurance policies.

V. Information Management Policies and Procedures (Section 1024.38)

A. Overview

The Proposed Rule would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to enable the servicer to meet certain objectives, including among others:

- Provide borrowers with accurate and timely information and documents in response to borrower requests made in accordance with the procedures set forth in § 1024.36;
- Provide owners or assignees of mortgage loans with accurate and current information and documents about any mortgage loans they own;
- Provide accurate information regarding loss mitigation options available to borrowers pursuant to §§ 1024.39 and 1024.40;
- Identify all loss mitigation options for which a borrower may be eligible pursuant to any requirements imposed by an owner or assignee of a mortgage loan;
- Provide prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option to servicer personnel that are assigned to assist the borrower pursuant to § 1024.40;
- Identify documents and information that a borrower is required to submit to make a loss mitigation application complete so that prompt notice of such requirements can be provided to the borrower pursuant to § 1024.41(b)(2);
- Evaluate loss mitigation applications and any appeals, pursuant to the requirements in § 1024.41; and

- Facilitate periodic reviews of service providers, including by providing appropriate servicer personnel with documents and information necessary to audit compliance by service providers with the servicer's contractual obligations and applicable law. [74]

In addition to the objectives, the Proposed Rule would require servicers to meet certain "standard requirements," including the retention of a "servicing file" and "records."[75]

The CFPB Proposed Commentary further states:

> A servicer may determine the specific methods by which it will implement information management policies and procedures that are reasonably designed to achieve the objectives set forth in § 1024.38(b) and are reasonably designed to ensure compliance with the standard requirements in § 1024.38(c). Servicers have flexibility to do so in light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints.[76]

We support the proposal to let servicers, rather than regulations, determine how to come into compliance with the stated objectives. This is important because some servicers are subject to the Settlement Agreements, which have specific information management requirements, which each servicer is permitted to implement differently.[77] Nonetheless, we are concerned that any flexibility will be questioned during examinations, and that ultimately servicers will be required to make changes based on unpublished examination policy.

Recommendation

We urge the CFPB and its examiners to permit as much flexibility as it can to reduce regulatory burden without compromising consumer protection or safety and soundness. We support the considerable flexibility offered by the proposed Comment 38(a)-1.

B. Servicing File

One of the proposed "standard requirements" would be to provide borrowers with a "servicing file" upon request, at the servicer's expense and without any reasonableness standard. The servicing file would be required to contain:

- A schedule of all payments credited or debited to the mortgage loan account and any escrow or suspense account;
- A copy of the note;
- A copy of the deed of trust;

[74] Proposed § 1024.30(b).
[75] Proposed § 1024.38(c).
[76] Proposed Comment 38(a)-1.
[77] Settlement Agreements Appendix A ¶ I.B.1.

- Any collection notes created by servicer personnel reflecting communications with borrowers about the account;
- "A report of any data fields relating to a borrower's mortgage loan account created by a servicer's electronic systems in connection with collection practices, including records of automatically or manually dialed telephonic communications[.]"
- Copies of any information or documents provided by a borrower to a servicer in accordance with §§ 1024.35 or 1024.41.[78]

We oppose proposed § 1024.38(c)(2). The Dodd-Frank Act does not require it, it is not subject to reasonableness or relevance standards, would be unduly burdensome, would breach confidential materials, would render compliance impossible in some cases, and it does not address a known problem.

This mandate would be a type of "back door discovery" requiring the servicer to provide information without regard to its relevance to any issue, or the reasonableness of providing it. It could impose costly compliance burdens disproportionate to whatever problem there may be. Judicial discovery has the benefit of being overseen by a neutral judge to decide what is reasonable and relevant, while this proposal has no such protections.

Servicers should not be required to produce collection data, notes, or other collection information for consumers. Servicers are not required to divulge to defaulting borrowers the collection strategy of the organization. Doing so could increase or prolong delinquencies.

Moreover, servicers are entitled to judicial oversight of discovery. Unfortunately, the proposed process would permit a "fishing expedition" by plaintiff's counsel in advance of a legal suit. If a consumer believes there may have been a potential violation of a consumer law, he should avail himself of the judicial process and the discovery should be conducted accordingly.

From the borrower's perspective, it is unclear what value is offered by proposed requirements § 1024.38(c)(iv), (v) and (vi). The production of any data fields relating to a borrower's mortgage account in connection with collection practices including records of phone communications, as well as, collection notes could result in the delivery of a hundred pages or more of screen prints for some delinquent borrowers.

From an operations perspective, a servicer could not merely push a button and instantly print collections information. The telephone records and collection notes must be produced by accessing individual screens one at a time and printing each screen shot manually. This is prohibitively time consuming and costly. Without a showing of relevance and reasonableness, this would be an undue regulatory burden and one we believe would not fit the definition of a valid QWR or valid oral request. Moreover, collection notes may be privileged, proprietary, trade secrets, or created for fraud prevention or to maintain information security. Other than debtors counsel conducting exploratory litigation opportunities, we cannot imagine a single borrower wanting voluminous information about telephone communication or collection notes. The Proposed Rule should not be a means to evade judicial discovery protections.

[78] Proposed § 1024.38(c)(2).

It is not reasonable to subject servicers to liability for not producing documents the borrower submitted. The borrower has a responsibility to maintain copies. Moreover, there is no nexus between the document request and a potential error.

Another critical concern is the fact that servicers do not necessarily have the information required by the Proposed Rule. Because servicers have not had to maintain this level of information in the past, existing loans will have records that cannot meet the proposed requirement and that cannot be recreated. For example, a servicer may not have a schedule of all credits and debits, especially if the prior servicer failed or servicing was transferred. Servicers today may not have collection notes or calling logs from years back even if the servicing has not transferred. Accordingly, the rules must be prospective with new originations and cannot apply penalties for past practices.

Even on a prospective basis, there are situations where a previous servicer's records may be incomplete. There must be a limit placed on how far back the information must go. Moreover, an exemption must be provided to transferee servicers especially in situations where servicing has been removed "for cause" by the GSEs or Ginnie Mae; the FDIC or NCUA is disposing of assets of failed institutions; and where the transferee servicer has performed due diligence upon the purchase of servicing rights. As can be imagined, servicers cannot possibly perform due diligence on every loan in a servicing transfer and it would not be reasonable to expect it. Failing to offer reasonable exemptions from transferor servicer errors/omissions will make servicing less valuable (a safety and soundness concern), will make servicing inalienable in some cases, will hamper asset disposition by the FDIC and NCUA, and will require indemnification from government agencies in order to take over servicing.

As a final matter, it is not clear what "[a] report of any data fields relating to a borrower's mortgage loan account created by a servicer's electronic systems in connection with collection practices, including records of automatically or manually dialed telephonic communications" means. It seems to mean a record of collection letters and calls if the servicer has that information electronically.

<u>Recommendations</u>

We strongly recommend removing proposed § 1024.38(c)(2).

If the CFPB proceeds with requiring disclosure of a "servicing file," at a minimum, the rule should:

- Never require disclosure of collection information.
- Never require disclosure of information that is proprietary, confidential, privileged, a trade secret, or that is used to prevent fraud or information security breaches.
- Never require production of information not reasonably available to the servicer.
- Permit servicers to limit the amount of information supplied to a reasonable amount and a limited period of time, taking into consideration the substance and significance of what problem the consumer is trying to solve. Simple borrower curiosity should not be sufficient reason for a servicer to incur costs.

- Not require compliance if the request for information would be duplicative, overbroad, unduly burdensome, or untimely within the meaning of § 1024.35(g), because servicers have a statutory right not to comply with overly burdensome information requests that are not intended to resolve a specific issue.

The Rule must be prospective with new originations and cannot apply penalties or liability for past practices. A limited exemption from the production of the servicing file and associated liability must be offered on a prospective basis as well.

C. Record Retention

The Proposed Rule requires a servicer to retain all loan records that document actions taken by the servicer with respect to a borrower's mortgage account until one year after the loan is discharged or servicing is transferred to a transferee servicer . This has significance if the language presumes to include origination files, which are typically in paper form, and if it includes loan sales, and not just servicing transfers. While the servicer maintains servicing records either electronically or via microfiche, many servicers, especially smaller entities, do not image the origination files. Upon a servicing transfer, these hardcopy files transfer for obvious operational reasons to the new servicer. In most servicing sales agreements, the transferor servicer obligates the transferee to provide access to transferred origination documents upon request and thus the need to copy or image old credit reports, GFEs, applications, and origination documents is not necessary. Given the age of some of the mortgages, the requirement to image or copy volumes of documents for a servicing transfer would be extremely costly, will delay transfers, and does not appear to benefit borrowers even marginally.

Recommendations

Servicers that retain contractual access to records that another entity possesses should be deemed to retain those records.

Any requirement that imposes on servicers an obligation to retain files or records must be applied prospectively to loans originated after an appropriate implementation period.

Any requirement that imposes on servicers an obligation to retain files or records must exclude situations where information cannot be transferred to the new servicer. This may occur when a servicer purchases servicing or is contractually required to assume servicing as a result of a servicer failure, FDIC or NCUA takeover, or involuntary transfer of servicing by the GSEs or Ginnie Mae. In those cases, information and records may be compromised. Servicers that take over such servicing must be immune from a requirement to produce historical records that are not available. Servicers must be immune from liability where the transferee servicer has performed due diligence upon the purchase of servicing rights.

D. Safe Harbor

We do not believe that servicers should be subject to a private right of action on discretionary items. However, if the CFPB proceeds with its rulemaking as proposed, servicers should have a safe harbor. The CFPB provides a safe harbor for servicers if they do not engage in a "pattern or practice" of failing to achieve any of the enumerated objectives and do not engage in a "pattern or practice" of failing to comply with the standard requirements, including record retention requirements and maintaining a servicing file.[79]

We are pleased that the CFPB recognizes that human and mechanical error can occur and that such errors deserve an appropriate exemption. The Proposed Commentary states:

> The servicer's liability in the event of a pattern or practice of failing to achieve the objectives in § 1024.38(b) or to ensure compliance with the standard requirements in § 1024.38(c) is based on whether the servicer's policies and procedures were reasonably designed to achieve the objectives in § 1024.38(b) and to ensure compliance with the standard requirements in § 1024.38(c), as appropriate.[80]

The Proposed Rule, however, does not define "pattern or practice" but instead references a "regular" practice of failing to meet the objectives. Historically, courts have defined what is a "pattern or practice" and it is unclear whether the commentary imposes a new standard for the courts to interpret. To avoid unnecessary judicial interpretation of the CFPB intent, we suggest that the CFPB adopt a definition of "pattern or practice" in order to avoid a narrow interpretation by courts. Courts have often interpreted the meaning of "pattern and practice" in a RESPA and/or TILA context and many courts have adhered to a broad definition when defining "pattern or practice."[81] However, some courts have adopted narrower definitions, and at least one court has deemed as few as five errors with a single borrower as a "pattern or practice."[82] Such a limited definition is not consistent with the CFPB's desire to prevent systemic weaknesses in servicers' Information Management Policies and Procedures. The AG Settlement creates margins of error thresholds between 1-10% depending on the error type. We fully support adopting error thresholds as a safe harbor from liability.

Recommendation

We recommend retaining the safe harbor and expanding it. It should provide that compliance with the Settlement Agreements, including staying within the Settlement Agreements' tolerances, even for servicers not a party to the Agreements, is compliance with the information management rule. The MBA, by proposing this standard, in no way suggests that all servicers should be required to comply with the standards set forth in the Settlement Agreements, but

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[79] Proposed § 1024.38(a)(2).
[80] Proposed Comment 38(a)(2)-1.
[81] *See First Nat'l Bank v. Office of Comp'r of Currency,* 956 F.2d 1456, 1461–62 (8th Cir. 1992) (noting that a failure to make a required TILA disclosure in 691 instances constituted a pattern and practice); *In re Maxwell,* 281 B.R. 101, 124 (Bankr. D. Mass 2002) (discussing the generally broader definition embraced by most courts); *Cortez v. Keystone Bank, Inc.,* No. 98–2457, WL 536666 at *10 fn. 2 (E.D.Pa. May 2, 2000) (noting that a parties failure to respond to multiple qualified written request when those requests concerned the same error did not constitute a pattern and practice); *Newton v. United Cos. Fin. Corp.,* 24 F.Supp.2d 444, 456 (E.D. Pa.1998) (noting that the intent of HOEPA was intended to prevent servicers from "wide ranging and institutionalized" practices not to punish parties for a few isolated errors).
[82] Ploog v. Homeside Lending, Inc., 209 F. Supp 2d 863, 869 (N.D. Ill. 2002) (failure to respond to five qualified writing requests constituted a "pattern or practice.")

merely suggests that compliance with the standards described in the Settlement Agreements should exempt a servicer from liability associated with the Proposed Rule.

E. Servicing Transfers

The Proposed Rule to require transfer of "all information and documents"[83] in a servicing transfer is too broad. Transferring electronic copies of documents is often preferable. We recommend striking the word "all." The paragraph would still require transferring what the new servicer would need. In the same paragraph, we recommend limiting the information transferred to that in the possession or control of the servicer. Servicing transferred after a servicer fails can have incomplete information as mentioned above.

Recommendations

A servicer should never be required to transfer information to which it does not have reasonable access.

Section 1024.38(b)(4) should be revised to read: "Timely transfer ~~all~~ information and documents relating to a transferred mortgage loan**,** that the transferor is reasonably able to access, to a transferee servicer in a form and manner that ensures the accuracy of the information and documents transferred and that enables a transferee servicer to comply with the requirements of this subpart and the terms of the transferee servicer's contractual obligation to the owner or assignee of the mortgage loan. . . ."

F. Discussion of Enumerated Objectives

1. Oversight of Service Providers

One of the enumerated objectives is conducting periodic reviews of service providers.[84] Such periodic reviews need to be subject to a reasonableness standard. A service provider could include an office supplies vendor or electricity provider. Not every service provider needs review, or would even permit review. Reviewing service providers should be required only when reasonable, material in size and risk, and only when the service is directly related to servicing federally-related mortgage loans and poses risks to consumers, investors, or servicers.

A service provider should not be subject to duplicative reviews by each servicer for whom the firm provides services. For example, current reviews required by the prudential regulators are overburdening professional, licensed foreclosure law firms to the point that it is no longer economically and operationally feasible for some to manage residential foreclosures. Foreclosure attorneys are inundated with individual reviews of a similar scope by each servicer with which they do business. The current "review" process required by prudential regulators is taking away from law firms' ability to perform critical foreclosure and bankruptcy work and is unnecessarily costly. Some foreclosure attorneys have exited the business because of the

[83] Proposed § 1024.38(b)(4).
[84] Proposed § 1024.38(b)(3)(ii).

extreme regulatory burden. A solution must be provided to avoid overtaxing servicers, law firms and other service providers while providing for meaningful review.

Recommendation

We suggest the CFPB endorse shared assessment programs. Of particular importance today, is the need for a shared assessment program for foreclosure and bankruptcy law firms. We suggest a program that follows a similar approach as currently utilized for SSAE 16 (which effectively replaced SAS70), USAP or Reg. AB certification. Such a program would involve a shared assessment report performed by a certified public accountant and/or attorneys (as appropriate) regarding the foreclosure and bankruptcy law firm's controls over processes and corporate governance. Assessments could then be shared with and relied on by all contracted servicers to assist in their third-party oversight of these law firms. Servicers would continue to perform on-going vendor performance monitoring and conduct periodic file reviews to further evaluate compliance with the servicer's contractual requirements and the applicable consumer risks are mitigated. We share the MBA's current shared assessment developed by PwC program with CFPB staff for consideration. See attached Exhibit.

In addition, we recommend clarification that service provider reviews should be limited to those activities that directly impact the servicing of the loan and which pose relevant risks to consumers, investors or servicers. .

Compliance with the Settlement Agreements' vendor management requirements should be deemed sufficient to meet § 1024.38(b)(3)(ii).

2. Loss Mitigation Information

Four proposed objectives are:

- Identify all loss mitigation options for which a borrower may be eligible pursuant to any requirements imposed by an owner or assignee of a mortgage loan[;][85]

- Provide accurate information regarding loss mitigation options available to borrowers pursuant to §§ 1024.39 and 1024.40;[86]

- Evaluate loss mitigation applications, and any appeals, pursuant to the requirements in § 1024.41;[87]

- Identify documents and information that a borrower is required to submit to make a loss mitigation application complete so that prompt notice of such requirements can be provided to the borrower[.]"[88]

[85] Proposed § 1024.38(b)(2)(ii).
[86] Proposed § 1024.38(b)(2)(i).
[87] Proposed § 1024.38(b)(2)(v).
[88] Proposed § 1024.38(b)(2)(iv).

These need to be reasonable in light of the circumstances. When HAMP was first announced, its requirements were unclear and changed frequently, but the program began nevertheless. Widespread confusion lasted for months. Servicers should not be liable for unclear government programs. Loss mitigation programs are often voluntary. If compliance is too costly or too risky, those programs will shrink.

We are also concerned with these provisions because it changes existing common law on issues of third-party beneficiaries. We discuss this concern in our comments to proposed § 1024.41.

Recommendations

We suggest including the word "reasonably" before "identify" in § 1024.38(b)(2)(ii) and (iv).

G. Technical Drafting Points

All the requirements of § 1024.38 should be limited to federally-related mortgage loans as defined in § 1024.2 because this is a rule under RESPA. As drafted, the rules appear to go much further than we believe was intended. For example:

- Proposed § 1024.38(a)(1) refers to "mortgage loan accounts." This could include commercial loans.
- Proposed § 1024.38(b)(v) contains an objective related to "a foreclosure process[.]" This could also include a commercial mortgage.

The Proposed Rule sets as an objective correcting errors in accordance with § 1024.35, then adds including service provider errors.[89] The second use of the word error also needs to be made "in accordance with § 1024.35."

The first sentence in § 1024.38(b)(4) refers to a "transferred mortgage loan" but means transferred servicing of the loan.

Proposed § 1024.38(c)(2)(iii) means deed of trust "or mortgage." Some loans have no deed of trust. Or, the term security instrument could be used because it refers to both.

VI. Early Intervention for Troubled or Delinquent Borrowers (Section 1024.39)

The Proposed Rule would require servicers to attempt to contact delinquent borrowers orally by the 30th day of delinquency to inform the borrowers that loss mitigation options may be available.[90] To comply, the servicer would have to call the borrower on at least three separate days by the 30th day of delinquency.[91] The servicer would be required to provide this oral notice for each missed payment, (*i.e.*, when the borrower becomes 30, 60, 90 days delinquent, and so

[89] Proposed § 1024.35(b)(1)(ii).
[90] Proposed § 1024.39(a) and Comment 39(a)-1(ii).
[91] Proposed § 1024.39(a).

forth).[92] In addition, the servicer must send a written notice no later than the 40th day of delinquency to provide general information about the loss mitigation programs available and to explain the foreclosure process and possible foreclosure timelines.[93]

While these efforts to contact delinquent borrowers are generally consistent with current industry practices, the timing of the outreach is not. We offer the following comments:

A. The 30-Day Oral Notice Timeline

Not all borrowers that fail to make a payment by the 30th day of delinquency are high risk. A number of one-time circumstances may prevent a borrower from making a payment in the month in which it was due. In many cases, traditional loss mitigation alternatives are not appropriate for these customers as they are able to immediately reinstate their loan. Dedicating resources to borrower outreach to low-risk borrowers takes resources away from those borrowers with the greatest need. FHA recognizes this dynamic in Mortgagee Letter 98-18 whereby loans with low risk of default as determined by risk management models are not required to have outbound calls by day 30. Rather, initial phone outreach must occur by day 45 for these customers. We recommend the Bureau establish the minimum standard for telephone outreach as 45 days instead of 30.

We request that the CFPB provide additional clarity that servicers are permitted to seek collection of loans that are delinquent, especially those loans that are 45 days or less delinquent, rather than be mandated to identify loss mitigation alternatives with these telephone calls. When loans are only one payment down, it is important that servicers seek to identify the source of the problem. If the reason for delinquency is simply a forgotten payment (one spouse thought the other spouse sent the payment); a large expenditure, such as a furnace replacement; illness or hospital stay; vacation; or other temporary or one-time situation, it is important that the servicer focus solely on establishing when the payment can be made, and not discuss modifications, forbearance agreements, short sales, and deeds in lieu. Discussing loss mitigation options of this nature would be a disservice to borrowers because they may feel entitled to these options when they are not available. Investors would likewise be impacted if accounts that would otherwise be collectable, are now seeking long-term loss mitigation.

<u>Recommendation</u>

We recommend that the Bureau establish a minimum standard that telephone outreach is to be conducted by the 45th day of delinquency.

Servicers should be permitted to seek collection of loans that are delinquent, especially those loans that are 45 days or less delinquent, rather than be mandated to identify loss mitigation alternatives with these telephone calls.

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[92] Proposed § 1024.39(a).
[93] Proposed § 1024.39(b).

B. Written Notices Timeline

Servicers understand the Bureau's interest in reaching borrowers early, but it is unclear what measurable difference will be achieved at the 40th day given that similar information will be sent by the 45th day of delinquency. Servicers must send a notice of the availability of Homeownership Counseling and SCRA benefits at day 45. Often, servicers include these notice requirements in full loss mitigation solicitation packages, which provide borrowers with detailed information about various loss mitigation options along with an application. Providing the Bureau's recommended notice at day 40 will not provide the borrower with any tangible benefit and will only serve to increase servicer costs. Furthermore, the letter is not as critical as it once was given the telephone contact. We recommend that the notice requirement be pushed back to day 45. Furthermore, we recommend that servicer's be allowed the flexibility to adapt existing 45-day notices to include the relevant sections of the model notice provided. There is no need to have servicers send two separate notices to the borrower at the same point in time. This could be both confusing and frustrating to the consumer.

<u>Recommendation:</u>

We recommend that the notice requirement occur by the 45th day of delinquency.

Furthermore, we recommend that servicers be allowed the flexibility to adapt existing 45-day notices to include the relevant sections of the model notice provided.

C. Content of the Notice

We applaud the CFPB for requiring only general loss mitigation information and general timelines for when foreclosure may be commenced. We urge that servicers be permitted to indicate a range for when a loan will be referred to foreclosure (e.g., 90 - 120 days delinquent) rather than identify a specific number of days, as proposed. The latter would require the creation of contract-specific letters. We also ask that servicers be permitted to add a disclaimer to indicate that the actual date of referral may differ. This would avoid unnecessary burdens if unforeseen circumstances occur or there are changes in agency programs and state laws or regulations that delay referral.

D. Small Servicer Exemption

We support an exemption for small lenders from the written notice requirement if they make other good faith efforts to contact borrowers (we assume by phone) within the notification timeline. As similar proposal was suggested in the SBREFA Outline, but was not incorporated into the Proposed Rule.

<u>Recommendations</u>

The CFPB should exempt small servicers from the written notice requirement if good faith efforts are make to phone the borrower.

VII. Continuity of Contact with Delinquent Borrowers (Section 1024.40)

A. General Requirements for Continuity of Contact

Proposed § 1024.40(a)(1) would require that no later than five days after a servicer has notified, or made a good faith effort to notify a borrower that loss mitigation options are available (not later than 30 days after the payment due date), the servicer must assign personnel to respond to the borrower's inquiries and assist the borrower with loss mitigation options. The Bureau cites three primary obligations for servicers:

1. Assign personnel to delinquent borrowers;
2. Provide delinquent borrowers with live, telephonic responses to inquiries and assistance with loss mitigation options; and
3. Establish policies and procedures reasonably designed to ensure that the personnel available to delinquent borrowers can perform the functions required.

Servicers agree that they must have adequate staffing levels to meet the needs of their delinquent borrowers. Providing borrowers with access to trained personnel that can assist them with the loss mitigation process is important for any well-designed default management operation. We agree with the Bureau's commentary that servicers should have discretion to determine the manner in which continuity of contact is implemented. Overall, we are pleased that the CFPB is permitting such flexibility. However, there are three significant concerns with the proposal: (i) the timing of the assignment of personnel; (ii) the timing of the assignment of personnel if the servicer uses behavioral call modeling; and (iii) the duration of the assigned personnel.

1. Timing of Personnel Assignment

The Bureau's Proposed Rule couples the assignment of the personnel (the starting point of the continuity of contact) with the oral notice requirement contained in § 1024.39. Such notice must be provided, or good faith efforts demonstrated, by the 30th day of delinquency.

The timing of this assignment is problematic for many reasons. First, the personnel assignment does not correspond with any demonstrated need on the part of the borrower for loss mitigation. Servicers already have specially trained collections/early delinquency personnel to identify borrowers that are of the greatest need for formal loss mitigation alternatives. Rather than assigning personnel when the borrower is 30 days delinquent, we believe personnel should be deployed when and if a borrower expresses a need for loss mitigation.

Second, most 30-day delinquencies self-correct with no formal loss mitigation intervention required by servicers. Establishing the assignment of personnel at such an early point in the delinquency is counter-productive to the goal of providing borrowers with assistance regarding loss mitigation options. Assigning personnel in these situations diverts resources away from those borrowers that most need the assistance.

Recommendation

We recommend revising § 1024.40(a)(1) to deploy continuity of contact personnel within five days of a borrower expressing a need for loss mitigation assistance.

2. Timing of Assignment of Personnel When Behavioral Call Modeling Is Used

Any continuity of contact requirement should be based on assigning personnel when the borrower expresses a need for loss mitigation assistance, not based on the number of days a borrower remains delinquent. However, if the CFPB proceeds with its proposal, we believe it should clarify that the use of behavioral risk scoring models that prioritize the order of borrowers to call first does not trigger the required assignment of personnel. As drafted, it appears that if the servicer uses a behavioral risk scoring model to prioritize calls, the servicer may have to assign personnel within five days of that first call. Such calls may occur as early as the fifth day after the due date. Servicers should not be required to assign personnel that early unless the borrower expresses the need for loss mitigation assistance.

Assignment of personnel should not be required when the borrower identifies as the reason for default a one-time event or error. In most cases, loss mitigation or collection staff can offer a grace period to make up the payment and no additional assistance is necessary. Likewise, if the borrower indicates that the missed payment was an error (e.g., the spouse was supposed to send the payment), no additional assistance is necessary.
Our proposal is consistent with the Settlement Agreements,[94] which require identifying a single point of contact upon borrower request for loss mitigation assistance[95] not upon the borrower becoming 35or fewer days delinquent. For the servicers that have spent the resources coming into compliance with that requirement, it would be unnecessarily wasteful to have to undo and change procedures especially since this provision is discretionary on the CFPB's part.

Recommendation

If the CFPB proceeds with the requirement that servicers assign personnel based on the number of days the borrower becomes delinquent according to § 1024.39(a), we request the addition of a Comment to § 1024.40(a)(1) to clarify that servicers are not required to assign personnel earlier than five days after the 45th day of delinquency (See Comments regarding Early Intervention).

3. Duration of Personnel Assignment

The Proposed Rule states that personnel remain assigned and available to a borrower until one of five conditions occurs:

(1) The borrower refinances the mortgage loan;
(2) The borrower pays off the mortgage loan;
(3) A reasonable time has passed since (i) the borrower has brought the mortgage loan current by paying all amounts owed in arrears; or

[94] Settlement Agreements Appendix A ¶ IV.C.
[95] Settlement Agreements Appendix A ¶ IV.C1.

> (ii) The borrower and the servicer have entered into a permanent loss mitigation agreement in which the borrower keeps the property securing the mortgage loan; or
> (4) Title to the borrower's property has been transferred to a new owner through, for example, a deed-in-lieu of foreclosure, a sale of the borrower's property, including, as applicable, a short sale, or a foreclosure sale; or
> (5) If applicable, a reasonable time has passed since servicing for the borrower's mortgage loan was transferred to a transferee servicer.

The Proposed Rule conflicts with the Settlement Agreements which provide that a contact remains assigned to a borrower's account until the Servicer determines in good faith that all loss mitigation options have been exhausted, the borrower's account becomes current or, in the case of a borrower in bankruptcy, the borrower has exhausted all loss mitigation options for which the borrower is potentially eligible and has applied.[96]

Recommendation

Continuity of contact personnel should remain assigned to a borrower until the servicer determines in good faith that all loss mitigation options have been exhausted, the borrower's account becomes current or, in the case of a borrower in bankruptcy, the borrower has exhausted all loss mitigation options for which the borrower is potentially eligible and has applied.

Treatment of Voluntary Reinstatements Trial Modification Plans: One of the conditions requires that:

> "a reasonable time has passed since (i) the borrower has brought the mortgage loan current by paying all amounts owed in arrears; or (ii) the borrower and the servicer have entered into a permanent loss mitigation agreement in which the borrower keeps the property securing the mortgage loan ..."[97]

The Official Commentary, Paragraph 40(c)(3)-1, states that "[f]or purposes of § 1024.40(c)(3), a reasonable time has passed when the borrower has made on-time mortgage payments for three consecutive months."

We believe that, in the case of both a voluntary reinstatement and a permanent loan modification that includes a trial period, the personnel assignment should cease upon reinstatement of the loan:

a. As mentioned earlier, most 30-day delinquencies self-correct with no formal loss mitigation alternative. There is no reason to continue the personnel assignment until the borrower has made three consecutive on-time payments following reinstatement. A voluntary reinstatement without formal loss mitigation demonstrates the borrower's intent to remain current under the debt obligation. Personnel should only be assigned in the event of a re-default and a request on the part of the borrower for formal loss mitigation.

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[96] Settlement Agreements Appendix A ¶ IV.C.5.
[97] Proposed § 1024.40(c)(3).

b. Most formal loan modification programs contain a trial period whereby a borrower must demonstrate the ability to make the modified mortgage payment for a period of three or four months before final modification is processed. The processing of the final modification results in formal reinstatement of the loan. Requiring personnel assignment for an additional three months following reinstatement via a loan modification program simply overlooks the fact that the borrower has performed under the trial plan for several months.

Recommendations

If the CFPB proceeds with its proposal on continuity of contact, we respectfully request the following changes:

Remove the "reasonable time" requirement from a borrower reinstatement by paying all amounts owed in arrears.

Amend the rule and the staff commentary to provide for different personnel duration times for voluntary reinstatements and those that involve formal loss mitigation intervention.

Acknowledge the period of borrower performance under a trial modification plan. We suggest the following language to accomplish this acknowledgment: "For purposes of § 1024.40(c)(3), a reasonable time has passed when the borrower has made on-time mortgage payments, including trial modification payments, for three consecutive months and has executed a permanent modification."

B. Safe Harbor

Proposed § 1024.40(b)(s) would provide that a servicer's policies and procedures satisfy the requirements established for the continuity of contact section if servicing personnel do not engage in a pattern or practice of failing to perform the required functions.

Servicers appreciate that the Proposed Rule establishes a safe harbor. However, Proposed Comment 40(b)(2) does not set the appropriate level of protections for the servicer. It states that a servicer may exhibit a pattern or practice:

> With respect to a single borrower, if servicer personnel assigned to the borrower pursuant to § 1024.40(a) fail to perform any of the functions listed in § 1024.40(b)(1) where applicable on multiple occasions, such as, for example, repeatedly providing the borrower with inaccurate information about the status of the loss mitigation application the borrower has submitted.

This exemption to the safe harbor is problematic because a single borrower can place many calls to a servicer expressing a plethora of issues, many of which may be redundant or conflicting. Borrowers often do not clearly articulate the information they need, or their situation. They may submit multiple applications. This often requires repeated contacts to solve or identify one issue, or it may result in relaying information that differs from what the borrower expected. This is especially true with more complicated cases that involve constantly changing financial data or the borrowers' changing requests for loss mitigation options. One case should not be deemed a failure to perform as it may not represent a systemic or actual failure.

Some courts have defined "pattern and practice" at a level that is too low and that we believe is inconsistent with the CFPB intent. The Settlement Agreements set metrics for determining when a violation occurs.[98] The CFPB's proposal does not. By failing to define a "pattern or practice" by regulation, courts will define it through litigation. This is not necessary. The Settlement Agreements establish as the basis for setting an appropriate error ratio/safe harbor, relevant here, at five percent error threshold systematically. Under the Settlement Agreements, the servicer is responsible for making a single point of contact ("SPOC") available upon request[99] and for giving the contacts access to relevant records, but servicers are generally not evaluated for compliance on a loan-level basis.

Recommendation

We recommend that the CFPB remove Comment 40(b)(2)-1.i, and not evaluate continuity of contact compliance on an individual loan basis.

The CFPB should establish a systemic error threshold of five percent and should deem compliance with the Settlement Agreements thresholds sufficient, even by those not subject to the Agreements. A CFPB threshold would have to be adjusted accordingly to reflect the Proposed Rule, which does not require a SPOC.

C. Small Servicer Exemption

We recommend exempting small servicers from the continuity of contact requirement. This is consistent with HAMP, which imposed a similar contact requirement only on those servicers with the largest commitments; the OCC Consent Orders, which apply to the largest institutions; and the Settlement Agreements, which apply to the largest five institutions.

Recommendation:

Small servicers should be exempt from the continuity of contact requirements.

VIII. Loss Mitigation (Section 1024.41).

A. Scope and Private Right of Action

As a threshold matter, despite certain language in the preamble, we are very concerned that the loss mitigation provisions as proposed are overly broad in scope, and will encourage borrowers

[98] Settlement Agreements, Exhibit E, ¶ E.1, p. E-11.
[99] Settlement Agreements Appendix A ¶ IV.C.2..

to pursue litigation arguing that they have a right to loss mitigation where neither Congress nor contract created such a right.

Proposed Comment 41(a)-1 states:

> Nothing in section 1024.41 imposes a duty on a servicer to offer loss mitigation options to borrowers in the ordinary course of business or to provide any borrower with a right to a loss mitigation option. Nothing in Section 1024.41 should be construed to permit a borrower to enforce the terms of any agreement between a servicer and any owner, assignee, guarantor, or insurer of a mortgage loan, including any agreement with respect to the evaluation for, or provision of, any loss mitigation option.

The preamble further states:

> " …that the rules should not be construed to impose liability on a servicer, or any other party, for any failure to offer a loss mitigation option, so long as the servicer complies with the procedural requirements of proposed § 1024.41.[100]

Attaching a private right of action for violations of these comprehensive loss mitigation regulations is a significant expansion of the scope of the liability provisions under RESPA and may present unwarranted exposure claims to servicers who also must comply with the loss mitigation requirements of their investors and others, which may conflict with the CFPB's requirements.

Borrowers do not currently have a right to receive loss mitigation options or the right to pick and choose among a menu of options. Fundamentally, the relationship between a mortgage lender and the borrower is contractual in nature and is generally governed by two documents, the note and the security instrument. Notes and security instruments do not generally include contractual provisions entitling borrowers to one or more loss mitigation options. Further, an investor's decision to offer one or more loss mitigation options does not create a right or benefit that inures to the borrower. For example, since the institution of the HAMP program, a number of borrowers have attempted to bring actions claiming servicers violated their rights to a HAMP modification, and courts have routinely rejected this theory.[101] The proposal would change this balance by requiring that all loss mitigation options be evaluated and disclosed to the borrower, creating uncertainty and litigation risk that courts will infer remedies if the servicer failed to evaluate the borrower correctly. Such a regulation may chill servicers' willingness to offer certain loss

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[100] 77 Fed. Reg. 57200, 57268 (September 17, 2012), Preamble.

[101] *See e.g. Simon v. Bank of America, N.A.,* 2010 WL 2609436 at *10 (D. Nev. June 23, 2010) (dismissing claim because HAMP "does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even to modify a loan"); *Aleem v. Bank of America,* No. EDCV 09–018122010, WL 532330, at * 4 (C.D.Cal. Feb. 9, 2010) ("There is no express or implied right to sue fund recipients, however, under ... HAMP"). As the Eleventh Circuit recently noted, "providing a private right of action against mortgage servicers [would] contravene the purpose of HAMP – to encourage servicers to modify loans – because it would likely chill servicer participation based on fear of exposure to litigation." *Miller v. Chase Home Finance, LLC,* 677 F.3d 1113, 1116 (11th Cir. 2012).

mitigation options and decrease servicers' ability to work with borrowers. Such a result is not in the best interest of either servicers or borrowers.

As the CFPB has noted, there are a number of comprehensive loss mitigation mandates already in place in the market and the CFPB has not indicated that these other mandates are failing to produce effective loss mitigation options that both protect consumers and provide solutions that are appropriate for each consumer.

An additional consequence of codifying loss mitigation procedures into regulation, which for the most part servicers are already following through HAMP, FHA, FNMA, FHLMC, VA, RHS, is to impede a servicer's ability to seek summary judgment in a foreclosure action. The end result will be to delay valid foreclosures, which in turn will increase costs to government agencies that must carry the cost of those delays, reduce value of properties, impact communities, and increase costs to new borrowers, as we are witnessing with the FHFA's latest announcement to increase guarantee fees in long-foreclosure states.

<u>Recommendation</u>

To the extent the CFPB proceeds with its rulemaking, the Loss Mitigation section should not be issued under RESPA § 6 authority and language should indicate that the penalties in RESPA § 6(f) do not apply.

To the extent the CFPB proceeds with its rulemaking, we strongly urge the CFPB to expressly provide in the regulation, as opposed to the commentary, that there is no obligation on the servicer, owner, investor, guarantor or insurer to offer loss mitigation and no private right of action for a servicer's (and other stated parties') failure to offer one or more loss mitigation plans.

It should also make clear that noncompliance with any CFPB loss mitigation "requirements" is not a UDAP or a UDAAP under federal or state law.

B. Safe Harbor

When performing complex loss mitigation, errors are inevitable, and servicers may not always succeed in achieving the established standards 100 percent of the time. It is especially difficult to be error-free given the high volume of defaults, the complexity of the programs available, the complexity of borrower situations, and the ever-changing rules servicers must follow.

If the CFPB proceeds with its rulemaking as proposed and does not exclude servicers from the private right of action liability, the CFPB should provide a pattern and practice safe harbor consistent with the proposed rule for other discretionary servicing provisions and recognize the servicing thresholds created in Exhibit E of the Settlement Agreements.[102] This safe harbor would provide protections for servicers in the event of litigation. However, we are not suggesting that servicers would be required to show compliance with the safe harbor as a part of examination procedures or as part of any reporting obligation. Establishing a safe harbor is

[102] *Servicing Standards Quarterly Compliance Metrics,"* National AG Settlement, Exhibit E1.

consistent with the Bureau's stated goal in the preamble "to ensure that borrowers are protected from harm in connection with the process of evaluating a borrower for a loss mitigation option and proceeding to foreclosure."[103]

A safe harbor is especially appropriate given the discretionary nature of the loss mitigation proposals and the private right of action liability. Moreover, providing a safe harbor would be consistent with the fact that this portion of the Proposed Rule is not mandated by Dodd-Frank.

Recommendations

The CFPB should create a safe harbor to protect servicers who have implemented procedures and processes in good faith rather than determine compliance on a loan-by-loan or act-by-act basis.

We strongly recommend that compliance with the Settlement Agreements, within their error thresholds, be deemed compliance with § 1024.41 even for those not subject to the Agreements. We recommend adding those thresholds where consistent with and relevant to CFPB's proposed requirements. The MBA, by proposing this standard, in no way suggests that all servicers should be required to comply with the standards set forth in the Settlement Agreements, but merely suggest that compliance with the threshold described in the Settlement Agreement should exempt a servicer from liability associated with this Proposed Rule.

It should also make clear that noncompliance with any CFPB loss mitigation "requirements" is not a UDAP or a UDAAP under federal or state law.

C. Definition of "Complete Loss Mitigation Application"

The Proposed Rule references and defines a "complete loss mitigation application" " to mean "a borrower's submission requesting evaluation for a loss mitigation option for which a servicer has received all the information the servicer *regularly obtains* and considers in evaluating loss mitigation applications by the deadline established by the servicer …"[104]

We strongly request that the CFPB more clearly define the term "complete loss mitigation application."

The current definition is ambiguous and may create differing standards based on loan and investor type. Because of the term "regularly obtains," the exact documentation requirements that constitute a complete loss mitigation application differ fundamentally by investor/insurer. For example, the Treasury MHA, GSE and FHA programs all differ in the required application as well as supporting documentation required of the consumer. Servicers of loans in these programs must have dynamic application criteria that vary by type of loan. Further, the documentation requirements can change and may differ depending on the borrower's situation, such as whether the borrower is self-employed, unemployed, or had a death of the co-borrower. Servicers must have the flexibility to determine what constitutes a completed application in

[103] 77 Fed. Reg. 57200, 57266 (September 17, 2012) Preamble.
[104] Proposed § 1024.41(b).

connection with the loan. We believe that it is the CFPB's intent to provide this flexibility, and we urge the Bureau to modify the language accordingly.

Recommendation

We recommend that the definition of "complete loss mitigation application" be "the servicer's receipt, by the deadline established by the servicer pursuant to paragraph [1024.41] (f) of this section, of all the information the servicer requires to begin evaluating the borrower for the loss mitigation options applied for."

D. Review of Loss Mitigation Application

Notwithstanding servicers' agreement that timely review and communication with borrowers about their loss mitigation options is fundamentally important, the Bureau is urged to reconsider certain aspects of proposed § 1024.41(c) due to conflict with certain established loss mitigation program requirements, and increased, unnecessary borrower cost and burdens.

Section 1024.41(c) establishes guidelines that govern the review of a complete loss mitigation application. Specifically, this section provides:

a) Servicers are to evaluate a borrower for all loss mitigation options to which they may qualify;
b) Servicers are to conduct this review within 30 days from the receipt of the complete loss mitigation application and
c) Servicers are to provide notice to the consumer as to whether or not a loss mitigation plan will be offered, also within the 30-day timeline.

Servicers understand and agree with the importance of timely review of a completed loss mitigation application and timely communication with the borrower as to what options are available. Not only does this serve the goal of helping consumers avoid foreclosure where possible, it is consistent with the requirements of MHA and other established loss mitigation programs in which many servicers participate.

However, these rules along with the Bureau's commentary related to these points appears to convey the expectation that a borrower will be evaluated for *all* loss mitigation options even when it may not be necessary or appropriate to do so based on loan program requirements (particularly those with a "waterfall" approach). Such a requirement would have significant adverse impacts to servicers and consumers. Specifically, these Proposed Rules will:

- undermine loss mitigation waterfall structures that servicers are bound contractually to administer;
- unnecessarily impose certain expenses on borrowers associated with a liquidation review:
- require borrowers to unnecessarily provide a much larger amount of application materials that are only required for a liquidation review;
- provide overwhelming and confusing disclosures to the consumer.

A discussion of each of these concerns follows:

1. Undermine Loss Mitigation Waterfall Structures

A fundamental characteristic of loss mitigation program design is the waterfall concept. Loss mitigation programs almost exclusively take the form of a waterfall of options. These waterfall designs serve two primary purposes:

1) Align the insurer/investor goals with the borrower by focusing first on home retention alternatives. Option waterfalls first and foremost promote home retention options for the consumer.
2) Prioritize options by cost and value to the insurer/investor.

Examples of loss mitigation programs that have defined waterfalls: Treasury Making Home Affordable, Fannie Mae, Freddie Mac, FHA, VA, RHS and virtually all Private Mortgage Insurance providers. Common characteristics of these waterfalls include:

1) For insurers/investors that dictate certain waterfalls, servicer participation is not optional.
2) Failure to administer the prescribed option waterfalls results in significant financial consequences to the servicer. For example, the FHA performs audits related to loss mitigation administration, and a servicer of FHA-insured loans failing to accurately apply FHA's waterfall would face financial penalties.
3) Consumers do not have the right to choose the most appropriate loss mitigation alternative for them. The final plan decision is completely based on an evaluation of their financial position in accordance with the plan rules. The Bureau acknowledges this fact by stating that "a servicer is in a better position than a borrower to determine the loss mitigation programs for which a borrower may qualify."
4) Once the evaluation is complete and the waterfall option is selected, a borrower no longer qualifies for any subsequent option. For example, a servicer of FHA-insured loans must apply the following waterfall of loss mitigation options in the following consecutive order: Special Forbearance, Loan Modification, Partial Claim, FHA-HAMP, Pre-Foreclosure Sale and DIL. In the event a borrower financially qualifies for Special Forbearance, the borrower does not meet the eligibility requirements for any of the remaining options in the waterfall.

Requiring servicers to consider and make available loss mitigation programs as options to borrowers in a manner and/or in an order that differs from the loss mitigation program requirements to which the servicer is contractually (based on the loan program terms) required to adhere places the servicer in an impossible situation of having to comply with two conflicting standards. Such a policy would also conflict with investors' contractual right to offer the least costly alternative, or no alternative at all. This is certainly not consistent with the Bureau's mission of coordinating with other agencies.

2. Unnecessary Costs to the Consumers for Certain Expenses

The requirement to review the borrower for all options for which they may qualify suggests that servicers must perform a complete evaluation for liquidation (non-retention) options which includes a short sale and deed in lieu of foreclosure. A formal evaluation of a borrower for a short sale and DIL will result in additional costs that will be passed on to the consumer. These costs include:

a) Appraisal Fee
b) Full Title Search Fee

A servicer cannot formally qualify a borrower for a short sale or DIL without incurring these expenses. These expenses seem unnecessary in circumstances where a borrower qualifies for a home retention option and is not interested in a liquidation option. Furthermore, the appraisal review and title review process are the most time consuming reviews that occur following the receipt of a complete application for a liquidation option. In the event that a servicer must perform this review on all completed applications, it will be difficult, if not impossible, to meet the Bureau's suggested 30-day timeline to complete the loss mitigation review.

3. Voluminous Application Materials for all Loss Mitigation Applications

The required application materials for loss mitigation retention workout options are generally smaller and more streamlined than application materials for liquidation options. Requiring servicers to obtain all necessary materials in order to evaluate for liquidation options as part of the definition of a "complete loss mitigation application" will place a significant burden on the consumer. This burden will apply to all consumers and not just those that qualify for and are interested in liquidation options. Our member servicers already experience a relatively high rate of borrower disengagement from consumers that aren't interested in or are frustrated by the application materials required for loss mitigation consideration. Any wholesale increase in the amount of application materials required of the consumer will surely increase rates of disengagement, resulting in more foreclosures.

4. Overwhelming and Confusing Disclosures to the Consumer

The Proposed Rule requires that a notice of the loss mitigation offer be sent to the borrower within 30 days of the receipt of the complete loss mitigation application. The commentary related to this requirement suggests that this notice should provide a listing of all of the options for which the borrower may qualify along with the results of this evaluation. Further, the notice requirement related to denial of loss mitigation found in sub-section (d) requires an itemized list of all loan modification programs and specific denial reasons for each. We believe these notice requirements to be excessive and highly confusing to the customer. Our concerns include:

- Simultaneous offer and non-approval information may be difficult for a borrower to understand.
- Denial reasons as a result of waterfall decisions may not provide any meaningful information to the consumer. Using the example listed before, if an FHA borrower qualifies for a Special Forbearance, they do not qualify for any remaining retention or liquidation option. The reasons for non-approval of all subsequent options may simply state: "Qualifies for Special Forbearance – disqualified from all other waterfall options."

Recommendations

We offer the following recommendations for alternatives to the problematic provisions in this section:

- Allow servicers to establish loss mitigation application requirements sufficient to perform a review of home retention options only. This will eliminate excessive application materials related to liquidation options.

- Allow servicers the allotted 30-day period of time following receipt of a complete loss mitigation application to evaluate for a home retention option.

- In the event that a borrower does not qualify for a home retention option and is interested in pursuing a liquidation option, allow servicers the ability to request additional information as part of the non-approval notice for home retention options. As a result, any review for liquidation options would occur outside the allotted 30-day period of time. Further, appraisal and title expenses would only be incurred at the point the borrower formally applies for these options.

- When a servicer receives a borrower's loss mitigation application, the borrower should be reviewed for all home retention options first, and notified only of the option that best complies with investor/insurer/guarantor guidelines.

E. Borrower Response and Performance

The proposed loss mitigation rules provide that a servicer may require a borrower to accept or reject a loss mitigation offer no earlier than 14 days after an offer is communicated to the borrower. In addition, the Proposed Rule provides that a borrower may demonstrate acceptance of the offer by merely sending the first payment according to agreement by the due date established by the servicer. Both provisions are problematic and create regulatory and legal challenges that we urge the Bureau to address.

1. Concerns Regarding 14-day Delay Requirement

It is critical for the Bureau to expressly provide for exceptions to the 14-day requirement for a borrower to accept an offer for certain fact scenarios requiring a shorter acceptance timeframe. This is particularly important for last-minute loss mitigation offers. Despite servicers' aggressive solicitation for loss mitigation at all points in the default life cycle, there are circumstances where borrowers do not engage in loss mitigation discussions until the last minute.

Oftentimes, it is the awareness of an imminent foreclosure sale that generates action on the part of borrowers. If a servicer elects to evaluate a last minute application and the borrower qualifies for a workout alternative, the servicer may not be able to establish an offer approval date of 14 days from the communication of the offer. In judicial foreclosure states, many counties and individual judges have established stringent requirements with regard to the ability to either postpone or outright cancel scheduled foreclosure sales. The following hypothetical example provides an illustration: A loan in the state of Florida has a scheduled sale date of October 1, 2012. The borrower submits a loss mitigation application for consideration on August 29, 2012. According to the published rules in this specific county in Florida, a servicer must communicate a postponement or cancellation to the court *no later* than 14 business days prior to the scheduled foreclosure sale in order to effectuate cancellation of the sale. That means that, in order to guarantee that the sale will not occur, a servicer must communicate cancellation of the sale to the judge by September 11, 2012. In this example, the servicer would not be able to provide a full 14 days for the borrower to accept a workout plan in the event he or she qualifies in order to effectively cancel the sale. Restricting servicers from implementing deadlines for acceptance to accommodate these situations would prevent borrowers from obtaining loss mitigations for which they qualify and would result in avoidable foreclosures.

2. Legal and Regulatory Challenges Associated with Payment as Sole Evidence of Acceptance

We strongly urge the Bureau to reconsider the provision of proposed § 1024.41(e)(2) whereby a borrower is deemed to have accepted a loss mitigation option so long as they make the first payment required under that option. This requirement ignores the existing legal and regulatory requirements associated with borrower acceptance of a loss mitigation plan, conflicts with existing program requirements to obtain fully executed (signed and in some instances notarized) documents evidencing plan acceptance, and poses material, significant legal challenges for servicers.

a) Servicers must obtain written agreements under most loss mitigation program requirements, including FHA, MHA, and GSE non-HAMP programs. Borrower payment as acceptance is an acceptable practice with regard to trial modification offers for the Treasury MHA program, GSE HAMP programs, and GSE non-HAMP modification programs. However, this only applies to the trial payment plan portion of these workout plans. MHA, Fannie Mae, and Freddie Mac all require the borrower to fully execute final modification documents evidencing the change in terms and conditions of the underlying mortgage debt. In fact, servicers failing to obtain fully executed modification agreements are subject to significant penalties.

   FHA loss mitigation program rules mandate that a borrower sign documents evidencing their workout plan regardless of the option. A signature is required for a Special Forbearance, Loan Modification, Partial Claim, FHA-HAMP, Pre-Foreclosure Sale and DIL. In particular, the Partial Claim and FHA-HAMP programs require a borrower to sign both a subordinate note and subordinate security instrument evidencing the FHA partial claim (all FHA-HAMP plans include a partial claim component).

   Further, the original security instrument evidencing the partial claim must be recorded in the appropriate jurisdiction. Both the original note and the recorded security instrument must be submitted to HUD's partial claim servicing contractor within 180 days of their execution. Servicers failing to obtain fully executed plan documents are subject to penalties under the FHA rules. For example, in the case of a partial claim completed by a servicer without obtaining the borrower's written agreement, the Servicer must reimburse HUD the entire amount of the partial claim advance. Requiring servicers to allow borrowers to enter into a modification in a manner that is not permitted by the program requirements places the servicers in the position of having to choose which rules it must violate. This is not consistent with the Bureau's mission of coordinating with other agencies and would be unduly burdensome on servicers compared to any benefit that would be received by borrowers.

b) Modifying the terms of an obligation without obtaining the borrower's written execution provides the servicer with less reliable evidence of the borrower's agreement in the event of a legal challenge to enforceability and acceptance of the terms. The presence of a written agreement signed by both parties eliminates any confusion with regard to the terms and conditions of the plan itself. Failure to obtain a written agreement signed by both parties places the servicer in an untenable position before the courts should the borrower later claim that he or she did not understand the terms or did not agree, and in fact, was harmed. Borrowers also benefit from a signed agreement for the same reasons--that is, to ensure that the servicer performs according to the agreement.

   A servicer is frequently required to provide the written loan modification or other documents to others in connection with the servicing of the loan. For example, oftentimes, a servicer must record the modification agreement in the land records in order to preserve the lien priority and the enforceability of the loan modification itself. Additionally, servicers are experiencing situations where, during judicial foreclosure proceedings, courts are unwilling to cancel foreclosure sales without signed agreements between borrowers and servicers.

The regulatory burden associated with the proposed requirement to allow borrowers to accept a loss mitigation plan simply by remitting payment far exceeds any perceived benefit associated with the proposal.

<u>Recommendation</u>

The CFPB must not impose a requirement to accept oral or behavioral acceptances of permanent loss mitigation offers.

The Bureau must expressly provide exceptions to the 14-day requirement for a borrower to accept an offer for certain fact scenarios requiring a shorter acceptance timeframe.

F. Deadlines for Loss Mitigation Applications

The Proposed Rule states that "A servicer may establish a deadline for a borrower to provide a complete loss mitigation application, which shall be no earlier than 90 days before a scheduled foreclosure sale."[105]

As further explained below, we urge the Bureau to reconsider this requirement or to build in appropriate exceptions to address the numerous situations wherein servicers must require earlier deadlines for submission of the loss mitigation application in order to meet state-specific

[105] Proposed § 1024.41(f).

requirements. Adoption of a hard-line rule preventing a deadline earlier than 90 days prior to foreclosure sale would cause servicers legal challenges in the following situations:

a) Loss mitigation applications required prior to foreclosure referral
b) Loss mitigation applications in long foreclosure timeline states
c) Loss mitigation applications in short foreclosure timeline states where notice of scheduling of sale occurs with minimal notice

1. Loss Mitigation Applications Prior to Foreclosure Referral

Many investor/insurer loss mitigation programs require a review of loss mitigation prior to the referral to foreclosure. In addition, many states have specific requirements to evaluate a borrower for loss mitigation prior to the filing of the first legal action commencing foreclosure. In these instances, it is necessary for servicers to send loss mitigation application materials with a defined due date. The Proposed Rule is problematic in these instances because the application due date will occur prior to the 90-day timeframe set forth in the Proposed Rule.

2. Loss Mitigation Applications in Long Foreclosure Timeline States

The Proposed Rule states that "A servicer may establish a deadline for a borrower to provide a complete loss mitigation application, which shall be no earlier than 90 days before a scheduled foreclosure sale."[106] This is problematic in states with a long foreclosure timeline, such as Florida, where a foreclosure can take 630 days.

It appears the Proposed Rule would give borrowers in Florida as much as 540 days to submit a complete loss mitigation application. We do not believe this is the CFPB's intent, or that it is consistent with the purpose of providing homeowners with loss mitigation solutions in a timely manner.

A more practical deadline is provided for situations where an incomplete package is delivered to the servicer before the deadline in § 1024.41(f). Comment 41(b)(2)(i)-1 states:

> A servicer should undertake reasonable diligence to obtain information to constitute a complete loss mitigation application by the earlier of (i) the deadline established by the servicer pursuant to section 1024.41(f) or (ii) the earlier time any documents or information submitted by the borrower will no longer be considered current or valid for evaluation for a loss mitigation option pursuant to applicable loss mitigation program guidelines.

Most loss mitigation programs consider documents that are 90 days old to be stale. We believe the CFPB would allow the servicer to set a deadline for receiving missing documents in order to complete a loss mitigation package or to set a deadline for receiving executed documents that is consistent with Comment 41(b)(2)(i)-1. We ask that such deadline be *sooner than* 90 days prior to the foreclosure sale. The referenced Comment, however, gives the borrower approximately 90 days to submit missing information. We believe servicers should set those deadlines to

[106] Proposed § 1024.41(f).

conform to investor or program requirements. HAMP, for example, allows for two notices one with a 30-day timeline and another with a 15-day timeline for borrower response.[107]

If the information is not received by the deadline, we believe the CFPB should allow the case to be closed. The borrower could make other attempts to seek loss mitigation up to the 90th day prior to foreclosure sale. The CFPB should realize, however, that the borrower may have to reapply. If the borrower reapplies at or before the 90th day prior to foreclosure, the loss mitigation application must be *truly complete* by the 90th day; otherwise servicers will be required to postpone foreclosure sales in many cases. The Proposed Rule is unclear on these matters. We respectfully ask that you clarify the rule consistent with our understanding.

<u>Recommendation</u>

We recommend that servicers be able to establish reasonable deadlines for obtaining missing information from loss mitigation applications that are earlier than the deadline proposed in § 1024.41(f). Servicers should be permitted to set deadlines for receiving trailing documents consistent with investor or program requirements.

However, if the borrower submits a loss mitigation application 90 days from the foreclosure sale, the package must be truly complete.

We suggest alternative wording of § 1024.41(f) as follows:

> *(f) Deadline for loss mitigation applications*. A servicer may establish any deadline for a borrower to provide a complete loss mitigation application; however, in the event a borrower submits a complete loss mitigation application at least 90 days prior to a scheduled foreclosure sale, the servicer is obligated to review the loss mitigation application consistent with section (c). In the event that a complete loss mitigation application is submitted less than 90 days from a scheduled foreclosure sale, evaluation of such application will be handled in accordance with investor requirements and procedures or the servicer's program requirements.

G. Prohibition of Foreclosure Sale

Additionally, the Proposed Commentary to section 41(g) includes several paragraphs about the prohibition on a foreclosure sale during a short-sale listing period, and when there has been a short-sale agreement. Servicers agree that a foreclosure should not occur during the listing and marketing period pursuant to a short-sale agreement. However, after the short-sale agreement period to market the property has expired, and a property has not sold, a servicer should be allowed to proceed to a foreclosure sale even if the borrower continues to list the property on his own. We ask that the rule be amended by adding §1024.41(g)(5) to state: "the property fails to sell during the short sale marketing agreement period."

[107] Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Version 4.0, Chapter, 2.2.3 "Incomplete Information Notice," (August 17, 2012), p. 73

H. Duty to Identify Other Servicers of Other Lien Holders and Provide Loss Mitigation Application to Them

The Proposed Rule contains a requirement for servicers to, within five days of receipt of a complete application:

a) Identify whether any additional lienholder exists, either subordinate or superior to the loan serviced and
b) Provide the loss mitigation application to the other servicer(s)

Any application received in this fashion must be processed by the other servicer consistent with section 1024.41.

This requirement is a new standard not required or even mentioned in other mortgage servicing standards. This rule is problematic for a number of reasons:

- The obligation to provide a loan servicer with a loss mitigation application is the responsibility of the borrower, not the servicer.
- Identification of the presence of other liens will result in unnecessary expenses assessed to the borrower as part of the review for loss mitigation.
- The premise that the presence of multiple liens makes loss mitigation cases difficult is not correct in many cases.
- The operational process of servicers sharing loss mitigation applications will expose them to privacy violations and security breaches and borrower litigation.

1. Obligation to Apply for Loss Mitigation Assistance is the Responsibility of the Borrower, not the Servicer

Fundamentally, borrowers must demonstrate the desire and willingness to pursue available loss mitigation alternatives with all of their mortgage servicers. It is not the responsibility of the servicer to take such action on their behalf. Borrowers may actually be harmed by the sharing of loss mitigation applications between servicers. A borrower could face loss of access to credit or other loss mitigation alternatives from the other servicer. This is especially apparent when a borrower is current on one mortgage while delinquent on another.

2. Identification of Other Liens Will Result in Unnecessary Expenses Assessed to the Borrower

The Bureau's commentary references three primary ways of identifying the presence of another lien subject to a mortgage servicer: a) credit reporting agency, b) search of land records, and c) use of a lien matching database. It is not clear as to whether or not the Bureau intends for servicers to utilize all three sources to identify the presence of a lien or just one. In any case, not all loss mitigation applications and reviews result in the servicer conducting a search using any of these means. Specifically, a search of land records is not performed in all instances. As a result, Servicers may be forced to spend $125.00 - $150.00 per complete loss mitigation application to conduct a land records search and pass such an expense to the borrower.

3. The Presence of Multiple Liens Does Not Impact Most Loss Mitigation Decisions

The Bureau commentary related to this requirement makes reference to loss mitigation situations where multiple liens exist as being the most difficult cases. Our Member's experience is not consistent with this statement. Specifically, very few loan modification decisions are impacted based on the presence of multiple liens. Oftentimes, loan modifications of first- lien residential mortgage loans do not require any involvement by any junior lien holder, including subordination agreements. Servicers of first-lien mortgages are able to freely modify their liens while both recording the modification agreement and, if required by the investor, preserving lien priority by purchasing title insurance specific for loan modifications. Loss mitigation liquidation options such as short sales and DILs do require communication and cooperation between multiple lien holders. However, there are already sufficient processes in place to ensure that this coordination exists. Furthermore, liquidation options comprise a relatively small percentage of all loss mitigation workout plans administered. It does not seem reasonable to require sharing of loss mitigation applications for all loss mitigation applications when only a small percentage of those would warrant such consideration.

4. Sharing Loss Mitigation Applications Exposes Servicers to Consumer Financial Privacy and Information Security Breaches and Litigation

Mortgage servicers, like all financial institutions, are very sensitive to customer information security and maintaining customer privacy. Building an operational process whereby highly sensitive information is sent outside the organization to a third party is difficult to control. In this case, servicers may only have limited information as to the other servicer and their appropriate contact information. Rarely will a servicer have a loan number for the additional lien. In the case of loans not assigned to MERS, it may be difficult to identify the actual loan servicer. The information contained in the land records and the credit agencies may indicate the presence of a particular loan serviced by Servicer X. However, at the point that the loss mitigation information is shared with Servicer X, the mortgage was transferred to Servicer Y. Sending the application to Servicer X could warrant a breach of information security by virtue of the fact that they no longer service that lien. This process could have an impact on Privacy Notice practices by all servicers. Borrowers, without knowledge of this sharing of information, could subject their servicer to unnecessary litigation for breaches of privacy.

The requirement to share private, sensitive customer information also conflicts with consumer financial privacy laws. Regulation P has several exceptions allowing disclosure of nonpublic personal information for disclosures with the consumer's consent, for disclosures in connection with administering the loan serviced by the servicer to whom the consumer submitted the application, or to "carry out" that loan.[108] There is no exception allowing a disclosure of nonpublic personal information for the purpose of alerting a servicer of a wholly separate loan of the consumer's detailed financial condition to prompt that recipient servicer to embark on a new transaction. The CFPB shares its rule writing authority under Regulation P with the Commodities Futures Trading Commission, Federal Trade Commission, and the Securities

[108] 12 C.F.R. §§ 1016.14 and 1016.15.

Exchange Commission.[109] If the CFPB will amend its Regulation P, it is required to do so in consultation with those agencies, and with state insurance authorities, "for the purpose of ensuring, to the extent possible, that the regulations prescribed by each agency are consistent and comparable with the regulations prescribed by the other such agencies."[110]

There is no impediment to consumers who want another lienholder to know about the loss mitigation application to simply mail it to that lienholder. This Proposed Rule does not have a material consumer benefit.

Recommendation:

We respectfully request removing § 1024.41(j) from the Proposed Rule. For the reasons cited above, these provisions have negative consequences to both consumers and servicers with no tangible benefit to anyone involved.

IX. E-Sign Act

The Proposed Rule would remove § 1024.23, which provides that the E-Sign Act applies to Regulation X. Proposed § 1024.3 would permit all Regulation X disclosures to a borrower to be electronic, subject to E-Sign Act compliance. The CFPB would remove the requirements in § 1024.21 that certain communications be provided in writing and some by first class mail.

Proposed § 1024.32(a) would provide that disclosures under §§ 1024.30 – 1024.41 to a consumer may be electronic, subject to E-Sign Act compliance. The proposed language is much clearer than the current language, and we appreciate this clarity. For pre-origination disclosures, the word consumer would be clearer than the word borrower, or the rule could simply refer to "disclosures" without mentioning who receives them, as in the "Know Before You Owe" proposed §§ 1026.37 and 1026.38.

REGULATION Z PROPOSALS

I. The Proposed Rule Should be Consistent with TILA Authority

The proposed amendments to Regulation Z would require the "creditor, assignee, or servicer" to send notices of the initial rate adjustment[111] and subsequent ARM reset notices.[112] Servicers would be required to send periodic statements,[113] although for the purposes of § 1026.41, "servicer is defined to mean creditor, assignee, or servicer, as applicable."[114] The "creditor,

[109] Dodd-Frank Act § 1093(3).
[110] Dodd-Frank Act § 1093(3).
[111] Proposed § 1026.20(d).
[112] Proposed § 1026.20(c).
[113] Proposed § 1026.41(a).
[114] Proposed § 1026.41(a).

assignee, or servicer" would be required to make the periodic statement disclosures clearly and conspicuously.[115]

TILA requires the "creditor or servicer" to provide hybrid ARM reset notices.[116] TILA restricts the fees for payoff quotes that "a creditor or servicer" may charge.[117] It also requires "servicers" to credit payments promptly.[118] It requires a "creditor or servicer" to send payoff balances within seven days of request.[119]

Creditors, but not others, are subject to liability for TILA violations under § 130. Assignees of creditors, but not others, are subject to liability for TILA violations under § 131, "only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement" and the assignment was voluntary. Additionally, 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."[120] TILA defines servicers quite specifically.[121]

The CFPB explains that its proposed § 1026.20(c) and (d) are "authorized under, among other authorities, TILA section 128(f), which applies to creditors, assignees, **and** servicers."[122] TILA § 128(f) actually requires the "creditor, assignee, **or** servicer" to provide periodic statements.[123]

The CFPB further explains:

> The Bureau also proposes to amend § 1026.20(c) to provide that it applies to creditors, assignees, and servicers. Current § 1026.20(c) applies to creditors and existing comment 20(c)-1 **clarifies that the requirements of § 1026.20(c) also apply to subsequent holders, *i.e.*, assignees**. The Bureau's proposal provides that § 1026.20(c) would apply to servicers, as well as to creditors and assignees. . . . The Bureau believes that applying § 1026.20(c) to creditors and assignees, but not servicers, would compromise consumers' recourse in the case of a violation of § 1026.20(c). Many creditors and assignees do not service the loans they own and instead sell the mortgage servicing rights to a third party. The servicer is the party with which consumers have contact on an ongoing basis regarding their mortgages. Consumers send their payments to the servicer and communicate with the servicer regarding any questions or problems with their mortgage that may arise. Where the owner and the servicer are different entities, consumers may not know the identity of the owner and may not even realize that the servicer is not the owner of their mortgage. Moreover, it can be difficult

[115] 41(c).
[116] TILA§ 128A(b).
[117] TILA § 129.
[118] TILA § 129F.
[119] TILA § 129G.
[120] TILA § 131(f)(1).
[121] "The term 'servicer' has the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(i)(2))." TILA § 103(cc)(7).
[122] 57333 (emphasis added).
[123] TILA § 128(f)(1) (emphasis added).

> for consumers to ascertain the identity of the creditor or assignee, even though servicers would be required to identify the owner of a mortgage under rules proposed pursuant to DFA section 1463. Thus, in the case of a violation of proposed § 1026.20(c), **consumers should be able to seek relief against the servicer as the primary party** from whom they receive service and with whom they maintain communication regarding their mortgages. *See* below, section 20(d), for a discussion of application of proposed § 1026.20(d) initial ARM interest rate adjustment notices to assignees. The same rationale applies to proposed § 1026.20(c) ARM payment adjustment notices. Proposed comment 20(c)–1 explains that any provision of subpart C that applies to the disclosures required by § 1026.20(c) also applies to creditors, assignees, and servicers.[124]

The characterization that existing Comment 20(c)-1 "clarifies that the requirements of § 1026.20(c) also apply to subsequent holders, *i.e.*, assignees" is misplaced. The Commentary is not a regulation and cannot create liability. It can provide a defense to liability only.

The rule would permit a consumer to bring an action against the creditor, assignee, or servicer, within the consumer's sole discretion. The proposed commentary makes clear that "[t]he creditor, assignee, or servicer are all subject to" proposed § 1026.41.[125] There is no requirement that the consumer first sue the servicer as the "primary party." There is no mention of how liability would be split between the "primary" and "nonprimary" party.

We do not share the CFPB's belief that it has authority to expand liability vastly beyond the very specific limitations in §§ 130 and 131.

Recommendation

We suggest that the CFPB adhere to the limitations on its authority.

II. Interest Rate Adjustment Notices

A. Comments Applicable to Both Sections 1026.20(c) and (d)

1. Opposition to Expansion Beyond Dodd-Frank

MBA appreciates the CFPB's willingness to consider our previous comments and concerns with regard to the subsequent ARM rate change notices in § 1026.20(c). We appreciate the Bureau's recognition that legal impediments exist that do not permit servicers to extend the notification period for all existing ARMs and we appreciate the Bureau's willingness to grandfather certain mortgages with look-back periods of less than 45 days. Nonetheless, we continue to question the value of changing the notice period given that it will only add 15-30 days of advance notice and expanding the content, including rigid formats, given these provisions were not required by the Dodd-Frank Act.

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[124] 77 Fed. Reg. at 57333 (emphasis added).
[125] Proposed Comment 41(a)-3.

We also express concern with the broad scope of §1026.20(d) given the Dodd-Frank Act's very narrow statutory focus to hybrid ARMs. The initial ARM adjustment notice should be limited to hybrid ARMs. This is logical because hybrid ARMs typically have extended fixed-rate periods. All other ARMs do not and, therefore, do not need advance warning. The initial ARM adjustment notice should be generic and not provide the extensive content and formatting contemplated. We provide more discussion below.

Recommendation

We recommend the CFPB not expand the content of the ARM adjustment notices and not expand the initial ARM adjustment notice beyond hybrid ARMs.

2. Treatment of Modifications

The Proposed Rule does not expressly exempt loans subject to a modification from the ARM adjustment notice required by § 1026.20(c) and the initial ARM adjustment notice required by § 1026.20(d). Interest-rate modifications made to loans in an effort to resolve delinquencies must be excluded from both requirements, including modifications that convert ARMs to fixed-rate loans. We do not believe the exemption offered at § 1026.20(c)(1)(ii)(B) or the treatment of rate changes in § 1026.20(d) are sufficient. Those provisions would still require presenting the § 1026.20(d) disclosures that are not applicable to modifications, such as identifying the index, since one is not necessarily used. The modification agreement should suffice without more if it indicates the rate, payment, and how long the rate will be in effect until the next change (as appropriate). A 60-day advance notice, and even a 25-day advance notice, would be highly problematic and delay execution of modifications, which is not desirable. Likewise, an elaborate ARM adjustment disclosure would be deficient, inaccurate, and incomplete if applied to modifications.

Recommendation

We recommend that any rate or payment changes in connection with a loan modification subject to § 1024.41, including a trial modification, be exempt from § 1026.20 ARM disclosures.

3. ARM Disclosures Are Inadequate for Certain Products or Are Generally Problematic

The MBA supports accurate and meaningful notices to borrowers concerning subsequent ARM rate change adjustments. Servicers have developed their notices to reflect important features of ARM products and resulting rate changes over time.

We are not aware of any deficiencies in the current subsequent ARM rate change notices and the CFPB has not provided a sufficient explanation that dictates specific information and rigid formatting requirements. Servicers indicate their notices provide similar if not better information than the CFPB model form, albeit in a different format. In fact, servicers have expressed concern with the sufficiency of the proposed ARM adjustment disclosures[126] and the initial ARM

[126] Proposed § 1026.20(c)(2).

adjustment notice.[127] The content and the model forms do not contemplate or accommodate the vast array of products currently in existence. If servicers are not given considerable flexibility to adjust the content and formatting to match the product features and conditions of the ARM loans they are servicing, we believe the forms will mislead, confuse and otherwise provide less consumer benefit than the disclosures offered today.

The Proposed Rule establishes rigid tables, configurations, substantive requirements, and order of presentation, that effectively dictate the Model Forms H-4(D)1, 2, 3 and 4. Yet TILA § 105(b) specifically prohibits the Bureau from requiring the use of a particular form. In the preamble, the CFPB states specifically that the Bureau proposes to make § 1026.20(c) subject to certain of the § 1026.17(a)(1) form requirements to which § 1026.20(c) disclosures are currently not subject, including "prohibiting inclusion of any information not directly related to the § 1026.20(c) disclosures."[128]

Servicers should be permitted the flexibility to add or subtract information depending on the loan product or account status to avoid providing misleading, confusing and incorrect information to the consumer. Below are examples of interest rate, calculations, and loan features that we believe the Proposed Rule does not accommodate in all cases:

- **i.** **Option ARMs:** The tables required by §§ 1026.20(c) and (d) are inadequate for disclosure of Options ARMs and other products that allow multiple payment options, including minimum/deferred interest, interest-only, 15-year amortizing, or 30-year amortizing payments. This concern results from the preamble to §1026.20(c)(3)(i), which states that the disclosures must be provided "in the form of a table and in the same order as, with the headings and format substantially similar to, Forms H-4(D)(1) and (2) in Appendix H to subpart C..."[129] Those Forms do not provide the appropriate configuration or explanations needed to describe each option. In addition, § 1024.20(c)(2)(ii)(C) appears to require servicers to make an assumption on the borrower's future payment option choice.

- **ii.** **Payment Rate ARMs:** The vast majority of ARM loans use the prevailing interest rate as of the principal and interest Change Date when computing a new principal and interest payment. However, some ARMs use a rate other than the prevailing interest rate to calculate the new principal and interest amounts. For example, a loan may have annual interest rate changes and principal and interest changes every five years. When a new principal and interest payment is computed, it may be based on the average of the last five interest rates rather than on the prevailing interest rate as of the change date. This type of ARM product has a 'Payment Rate'. Below is text from a sample note.

  > The "Payment Rate" is the sum of the interest rate figures calculated under Section [ ] above for the Payment Change Date on the four

[127] Proposed § 1026.20(d).
[128] 77 Fed. Reg. 57318, 57340 (September 17, 2012), Preamble.
[129] 77 Fed. Reg. p.47.

preceding Interest Change Dates, divided by the number 5, rounded to the nearest one-eighth of one percentage point (0.125%).

It does not appear that §§ 1026.20(c) and (d) would accommodate a payment that is not based on the prevailing rate.

iii. **Rounding:** For both disclosures, it is unclear how to handle the rounding of the interest rate that most ARM notes require. Most ARM rates are determined by adding the margin to the index and rounding to the nearest 1/8 of a percentage point.

iv. **Estimating Escrow Payment:** Section 1026.20(d) requires an estimation of escrow payments because of the advance disclosure. With a seven- to eight-month advance notice requirement, the escrow payment will be at different levels than when the actual rate is determined. Servicers should be able to use the escrow payment amount as of a date within 30 days of preparing the disclosure or project what escrow payments will be.

v. **Severely Delinquent Borrowers** – The Proposed Rule is unclear on how to disclose adjustment information to borrowers who have remained delinquent over multiple rate and payment changes. The tables on Model Forms H-4(D)(2)- H-4(D)(4) display a 'current rate', which is identified as the interest rate that applies on the date the disclosure is provided to the consumer. The preamble defines 'current' as the interest rate disclosed in the last notice. For borrowers who are delinquent over multiple rate changes, the rate that was disclosed in the last notice will not be the rate that applies on the date of the disclosure. Servicers should be permitted to use terminology that accurately reflects the rate that was disclosed on the most previous ARM adjustment to the consumer.

Recommendation

The CFPB should not proceed with its proposal to amend the subsequent ARM rate change notice or exceed the Dodd-Frank Act provisions for the initial ARM reset notice. However, if the CFPB does proceed, servicers should be permitted to adjust the forms by adding, changing or removing information to ensure an accurate and full disclosure.

4. Additional Information in ARM Notices

The CFPB proposes to require information in both the initial and the subsequent adjustment notices that is not statutorily mandated, including the amount and expiration date of any prepayment penalty.[130]

Prepayment penalty information should not be required on the ARM notices because the information will likely be inaccurate and extremely difficult to produce in bulk as the Proposed Rule would require. There are variations on how to calculate a prepayment penalty and certain

[130] Proposed §§ 1026.20(c)(2)(vii) and 1026.20(d)(2)(ix).

assumptions would have to be determined to make this calculation, which could differ in the way a prepayment penalty is calculated. An accurate number would depend on the date on which the penalty was calculated and on a borrower being current on loan payments. Also, currently, the prepayment information is not included on a file received by a servicer's print vendor because many servicing systems do not have the means to calculate and store prepayment penalties that would feed into an ARM notice.

It would be difficult and costly to go back in time and recreate this information on a servicing system, when it is currently not included. Borrowers can get the information by contacting customer service representatives; rather than servicers creating information known to be inaccurate or misleading, which the borrower has not requested—this could even confuse a borrower. Additionally, most servicers no longer originate loans that include prepayment penalties.

Recommendations

We recommend that initial and subsequent ARM adjustment notices not be required to include a dollar amount of a prepayment penalty.

As an alternative, the CFPB could require that servicers indicate on the ARM notices when a prepayment penalty exists and advise the borrower to contact customer service for more information.

5. Housing Counselors and State Housing Finance Authorities

Housing Counselors: We commend the CFPB for not requiring that servicers list the addresses, telephone numbers, and internet addresses of individual housing counselors, but instead identify HUD's or the CFPB's website and toll-free numbers in the initial ARM reset notice.[131] We also support the proposal not to include this housing counselor information on disclosures required for subsequent ARM adjustment notices.

SFHAs: The CFPB requests comment on how to lessen the burden of identifying a state housing finance authority (SHFA) where the borrower resides as required by § 1026.20(d)(7)(vi) and where the property is located as proposed by § 1026.41(d)(7)(v)(A). We suggest using CFPB's exemption authority to remove this requirement in both sections. Alternatively, the CFPB's website could include information for SHFAs. This would remove the need for servicers to identify the mailing address, website, and phone number for SHFAs. This would remove a significant burden and cost that every servicer separately maintain an accurate list of SHFAs, which most consumers do not need or use. Finally, the CFPB could allow servicers to select whether they include in the initial rate adjustment notice, the housing counseling *or* SHFA information as permitted by the Dodd-Frank Act for periodic statements.

[131] Proposed § 1026.20(d)(2)(xi).

Recommendation

We suggest using CFPB's exemption authority to remove statutory requirements to identify SHFAs in their entirety. Alternatively, we urge the CFPB to list SHFAs on its website, which consumers can access at any time, before or after they apply for a loan, rather than requiring lenders and servicers to maintain a list. The servicer could then point to the CFPB website in the initial ARM adjustment notice.

6. Definition of ARM

We support the continued exclusion of open-end lines of credit,[132] from the ARM adjustment notices and the clarified definition of a non-adjustable-rate loan.[133]

B. Comments Specific to ARM Rate-Change Notices - § 1026.20(c)

1. Look-Back Periods and Notification Timelines

The Proposed Rule would require subsequent ARM rate change notices to be sent 60 to 120 calendar days before a payment at a new level is due.[134]] Existing Regulation Z requires such notices to be given 25 to 120 calendar days before a payment at a new level is due, or annually if there is a rate change, but no payment change.[135] The Proposed Rule would remove the requirement for an annual notice with no corresponding payment change and we welcome this change.

The Proposed Rule would grandfather mortgages with look-back periods of less than 45 days if originated before July 21, 2013.[136] Loans subject to the grandfather would continue to operate on a 25 to 120 calendar day timeline. While we appreciate the grandfathering of existing loans, we reiterate our concern with the need to change the notes at all. There are substantial costs, complications, and impediments associated with even a prospective application of a 60-day notice requirement. No studies have identified any material problems with the current notices that demand an overhaul.

As stated in our previous SBREFA letter, this proposal would require a significant undertaking, requiring federal agencies and the GSEs to adjust their notes.

In response to the Federal Reserve's similar proposal published for comment in 2009, two large servicers estimated that the upfront cost would be about $1 million per institution to apply a 60 to 120 calendar day notice period. The costs involve making systems changes to capture the new information and calculations, changing the notes, changing existing disclosures, making sure all business partners and staff are trained, and increasing due diligence and quality control, especially on brokered or correspondent loans. The presumed benefit to the borrower of such a

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[132] Proposed § 1026,20(c)(1).
[133] Proposed Comment 20(c)(1)(ii)-3.
[134] Proposed § 1026.20(c)(2).
[135] 12 C.F.R. § 1026.20(c).
[136] Proposed § 1026.20(c)(2).

change is a notice approximately 15 to 30 days earlier than the one received today. Servicers are not likely to provide notices earlier than two months because the borrower is at risk of forgetting the rate and payment change. The significant cost to the industry, therefore, appears to outweigh a slightly earlier disclosure. The Federal Reserve ultimately did not finalize its proposal.

The effective date of the grandfather (e.g., July 21, 2013) is also not sufficient. FHA, VA, and the GSEs will need to change their notes first. Lenders and servicers must wait for these official changes. These agencies need time to decide whether to change their notes and, if they do so, will need time to make changes to their notes, obtain any OMB approval, and release revised documents and guidance. Thereafter, lenders, servicers, service bureaus, technology vendors, form vendors, attorneys, and other affected entities would need at least 12 months to implement the requirements, given the competing demands on internal and technology systems and staff. The July 21, 2013 deadline, therefore, is too short. Moreover, any grandfather provision must be coordinated with the implementation date for the subsequent ARM rate-change notice.

Recommendations

We urge the CFPB not to change the current 25 to 120 advance notice for recurring ARM adjustment notices.

However, if the CFPB proceeds with this proposal, we ask that the grandfather be extended to all loans originated until a year after FHA, VA, and the GSEs have issued final changes to their notes or to the implementation date of the § 1026.20(c) notice, whichever is later.

C. Comments Specific to Initial ARM Adjustment Notices – § 1026.20(d)

1. ARM Adjustment Notices Should Be Limited to Hybrid ARMs

The Dodd-Frank Act requires creditors or servicers to provide borrowers with a notice regarding the initial interest-rate adjustment of a hybrid ARM at the end of the introductory period either (a) between six to seven months before that reset (e.g., seven to eight months before the new payment date) or (b) at consummation of the mortgage if the first reset occurs during the first six months after consummation.[137] The CFPB proposes to expand this requirement to all ARMs.[138]

We respectfully object. In all cases, such notices would require servicers to guess the future interest rate, UPB and escrow payments. The advance notice would almost always be inaccurate.

We cannot support confusing borrowers about their payment amounts. It is not clear what the consumer would do with the inaccurate notice, but we certainly hope they do not take any action based on inaccurate information.

[137] TILA § 128A(b).
[138] Proposed § 1026.20(d).

The proposed model form says, "The table above shows our estimate of your new interest rate and new monthly payment." Servicers do not want to indicate to their customers that the servicer supports or stands behind the inaccurate disclosure and thus servicers should be able to include appropriate disclaimers.

The Proposed Rule would require servicers to bear the cost of sending an inaccurate disclosure to consumers then months later, make another disclosure, this time with the actual rate and payment information. Servicers would incur increased costs responding to inevitable calls that will come in questioning the disclosure. The proposal is especially burdensome on smaller servicers given the duplicative nature of the requirement.

The statute is problematic because it requires the servicer to provide misleading information to borrowers with hybrid ARM loans. Rather than limit the confusion, the CFPB proposes to expand it to more loans.

The cost of producing these new disclosures on all ARMs would be significant in terms of systems changes, mailing costs, printing, training, litigation costs, and so on. Given the CFPB's stated objective to avoid surprises and provide borrowers with clear and accurate information, we urge the Bureau not to expand problematic statutory disclosures to all ARM loans.

Recommendation

We do not believe that the initial ARM adjustment notice should be imposed for any ARM product. However, if the CFPB does not use its exemption authority in this case, the CFPB should consider requiring a generic notice advising the borrower that the ARM loan will adjust in {x} months and that their monthly payments may change as a result. This would meet the stated objective of reminding borrowers that their rate and payment may change and provide them with ample opportunity to consider refinancing. Alternatively, this rule should be limited to hybrid ARMs.

2. Loss Mitigation "Options" Would Be Misleading

We are concerned with the Dodd-Frank Act requirement that initial ARM adjustment notices identify "alternatives" to an adjustment,[139] especially "renegotiation of loan terms"[140] and "payment forbearances."[141] This disclosure would give borrowers the false impression that these loss mitigation options are available, even when they are not. It may also give the false impression that the consumer may elect between the different options. Borrowers obtain loss mitigation solutions only when permitted by investors, and when borrowers demonstrate the requisite financial hardship. In some cases, certain loss mitigation options are not available. For example, many state bond programs do not permit loan modifications, so providing modification information would mislead borrowers about those programs.

[139] TILA § 128A(b).
[140] TILA § 129A(b)(4)(B).
[141] TILA § 128A(b)(4)(c).[

Even with the conditional language in the Model Forms H-4(D)(3) and (4), listing these "options" could give borrowers the false impression they do not have to honor their contacts and pay at the new rate. This is especially problematic because the proposed language does not include a sufficient disclaimer. The model language states:

> If you seek an alternative to the upcoming changes to your interest rate and payment, the following options may be possible (most are subject to lender approval):
> ….
> Modify your loan terms with us.
> Payment forbearance temporarily gives you more time to pay your monthly payment.[142]

These statements are too definitive, appear to be offers, and have very limited cautionary disclaimers.

The result of these misleading disclosures will be unnecessary delinquencies, unfulfilled expectations, and dissatisfaction with the servicer. Listing loss mitigation "options" seems especially out of place when rates are declining.

Recommendations

We recommend that the CFPB use its exemption authority under TILA to remove § 1026.20(d)(2)(viii)(C) and (D), which require that servicers list modifications and forbearances as alternatives to the ARM adjustment. Alternatively, the CFPB could reword and combine the last two items to state: "If you anticipate being unable to pay the new payment amount, contact us to discuss possible loan modification and forbearance options." This information could be grouped with the counseling and state housing finance agency information because the model header appropriately states: "If You Anticipate Problems Making Your Payment."

The CFPB should permit servicers to include disclaimers about the accuracy of the information.

III. Prompt Crediting of Payments and Partial Payments

The Proposed Rule restates § 1464 of the Dodd-Frank Act and Regulation Z with regard to the application of conforming payments. The Proposed Rule adds that servicers would be permitted to either retain partial payments in suspense or return them.[143] We support the ability, but not the requirement, to use suspense accounts for partial payments. Small servicers cannot afford the cost of implementing mandatory suspense accounts, so this flexibility is welcome.

A. Definition of Full Contractual Payment is Problematic

The Proposed Rule would require that servicers apply a full contractual payment to the consumer's loan account as of the date of receipt. The CFPB defines a full contractual payment

[142] 77 Fed. Reg. 57318, 57406, Model Form H-4(D)(3).

[143] Proposed § 1026.36(c)(1).

to be principal, interest, and escrows (if applicable). This definition excludes late fees and other fees. This is inconsistent with standard security instruments, which define a full contractual payment to be principal, interest, tax, insurance, leasehold (if applicable), late charges and other fees.

The FHA Model Mortgage Form provides at Covenant 1: "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note **and late charges** due under the note."[144] In addition, Covenant 2 requires the borrower to include in each monthly payment the sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance.[145]

The GSEs' Uniform Security Instrument also defines a full contractual payment. It provides:

> Borrower shall pay when due the **principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note.** Borrow shall also pay funds for Escrow Items pursuant to Section 3 . . .

We are concerned that the CFPB is redefining contractual terms, which is beyond its authority and not appropriate. The end result of redefining a full contractual payment is to prohibit the collection of late fees in perpetuity. This is extremely problematic. Servicers are contractually permitted to collect late fees according to the mortgage or deed of trust.

As an accommodation to borrowers, however, most servicers will apply a payment if the full contractual payment is received minus the late fee. Fannie Mae and Freddie Mac's Uniform Instrument refers to this as a "Periodic Payment." This postponement in the receipt of a late fee, however, does not change the contractual right to collect such late fees in the future. Some security instruments, such as the Fannie Mae/Freddie Mac Uniform Instrument specify when a late fee should be postponed and when it can be collected. FHA's model security instrument does not address late fees in this way and need not do so because of the order of the application of payments. In any case, it is common industry practice to apply a payment if it includes principal, interest, and escrow amounts in order to avoid a delinquency. The borrower, however, is still obligated to pay the late fee, but it would be recouped at a later time. As a result of this industry practice, we do not believe it is necessary to address this issue in the final rule. We strongly object to the CFPB seeking to alter the mortgage contract through regulation and to define a full contractual payment in a way that is inconsistent with the security instrument.

B. Loan Subject to Breach Notice or Acceleration

The Proposed Rule would require servicers to "[P]romptly apply funds held in the suspense or unapplied funds account to the oldest outstanding payment when sufficient funds accumulate in such account to cover a full contractual payment."[146] This is standard industry practice if the

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[144] http://portal.hud.gov/hudportal/documents/huddoc?id=4155-2_12_secA.pdf (March 1, 2011) (Emphasis Added)
[145] Id. Covenant 2.
[146] Proposed 1026.36(c)(ii)(B).

borrower has not been subject to a breach notice or acceleration. The Proposed Rule does not address these state law preconditions to foreclosure and does not address Chapter 13 bankruptcies. We urge the CFPB to do so.

When a breach letter is sent, borrowers must pay the entire amount in arrears by a certain date, usually within 30 days of the letter. If the borrower does not bring the loan current, the loan is "accelerated." When the loan is accelerated, the borrower is no longer contractually or statutorily entitled to pay the arrearage or portions of the arrearage, but must pay the entire outstanding indebtedness. Acceleration is a legal prerequisite to foreclosure. If servicers are required to "apply" less than the full amount of the debt, the servicer would be disadvantaged, its ability to proceed to foreclosure would be frustrated, and the provision would be in conflict with express provisions of the security instruments and creditor rights provisions under state law. The final rule must expressly accommodate payments required for loans that are subject to a breach notice and acceleration.

We also believe it is critical to clarify in the final rule that if the loan is subject to a breach notice or is accelerated, the conforming payment[147] is the arrearage or outstanding indebtedness, respectively. Thus a payment received by the servicer that is less than those amounts would not be deemed "accepted" or need to be "applied" even if the payment represents one or more full monthly payments.

C. Treatment of Loans in Bankruptcy

Also, servicers of loans in Chapter 13 are not permitted to mix the amounts held in the pre-petition trustee pay account with the post-petition borrower or trustee pay account to make a full contractual payment. Pre-petition money is for the arrearage claim (principal, interest, tax, insurance, and fees due before the bankruptcy was filed) and is paid over five years. Post-petition money is for payments made post filing. The two accounts cannot be combined when the borrower is in active bankruptcy. There must be a sufficient amount in one of the two accounts alone in order to make a contractual payment from suspense. This is problematic as the Proposed Rule is currently stated. We suggest an exemption from the stated requirement for Chapter 13 accounts.

D. Treatment of Loans in Suspense

The Bureau asks whether it should identify a timeline in which funds held in suspense should be returned. We do not recommend setting specific timelines. It would contradict the Uniform Security Instrument. Moreover, allowing flexibility will facilitate loss mitigation efforts and allow time for borrowers to correct underpayment mistakes before payments are returned. Too short of a return policy would result in the need for additional diligence, time and costs on the part of the borrower who corrects an underpayment only to find out the servicer returned the original partial payment.

[147] Servicers indicate in the written "demand letter" that the loan will be accelerated. Acceleration is also described in the mortgage and thus we conclude no additional "writing" would be required to comply with the Proposed Rule, which calls for the definition of a conforming payment to be in writing.

E. Treatment of Partial Payments

Finally, because servicers have differing policies on whether and how they will accept a short payment, we recommend that the CFPB indicate in a Comment that the lender is permitted, but not required, to apply any partial payment it receives. This would also allow consistency with the Settlement Agreements.[148]

Recommendations

The CFPB should not define a full contractual payment that is inconsistent with the security instrument.

The CFPB should not require application of payments that are inconsistent with the security instrument (e.g. application after a breach letter or acceleration).

Bankruptcies should be excluded from this provision so that they may follow bankruptcy laws and rules.

The CFPB should permit servicers to treat partial payments as permitted under the loan agreement, the Settlement Agreements, and consistent with demand/breach and acceleration requirements, and in accordance with bankruptcy laws and regulations.

IV. Payoff Amounts

The Proposal restates the Dodd-Frank Act's payoff provisions and would require servicers to provide payoff statements within seven business days of a written request.[149] This would amend Regulation Z, which currently provides servicers with a safe harbor if the payoff statement is provided within five business days, but permits longer periods if the servicer experiences a high volume of requests.[150]

For most loans, seven business days is sufficient time to produce a payoff statement, but seven business days may not be sufficient time for more complex loans or situations. The CFPB has the authority to provide certain exemptions to the payoff provisions.[151]

It is critical that the CFPB permit a reasonable extended period of time to prepare payoff statements for loans in delinquency, foreclosure or bankruptcy because they necessitate reconciliation of outstanding third-party charges and reconciliation with bankruptcy courts and trustees.

Reverse mortgage loans and shared appreciation loans should be exempt from the seven-business day rule because they can require an appraisal to determine the payoff amount.

[148] Settlement Agreements Appendix A ¶ I.B.3.
[149] Proposed § 1026.36(c)(3)..
[150] Comment 1026.36(c)(1)(iii)-1.
[151] TILA § 105(a).

In addition, we urge the CFPB to issue a limited exemption from § 1026.36(c)(3)(1)(iii), which requires "an accurate payoff statement of the total balance required to satisfy the consumer's obligation in full as of a specified date" in cases where the servicer relied on a payment that was later dishonored or that the borrower reversed. Servicers have encountered instances where a monthly payment received from a borrower by check was relied on to quote the payoff statement, only to be reversed because of non-sufficient funds. Likewise, a payoff statement was offered based on an ACH payment that was later stopped. In both examples, a quote was provided that was less than the amount necessary to pay off the loan. As such, the accuracy of the payoff statement should be determined based on the servicer's knowledge at the time the quote is prepared and servicers should not be penalized for variances resulting from the actions of the borrower.

Recommendations

We recommend an exemption from payoff statement timing for delinquent loans, loans in foreclosure, loans in bankruptcy, reverse mortgages and shared appreciation loans. The accuracy of a payoff statement should be determined based on the servicer's knowledge at the time the quote is prepared. Servicers should not be penalized for variances resulting from the actions of the borrower that contributed to an incorrect payoff statement.

V. Periodic Statements

The Proposed Rule would require that servicers send a periodic statement for each billing cycle for most closed-end loans secured by a dwelling.[152] The use of a periodic statement would not be required for reverse mortgages, HELOCs, or fixed-rate loans where the servicer uses a coupon-book. There is a small servicer exemption from the periodic statement requirements.

The Proposed Rule would expand the requirements of the Dodd-Frank Act to include a large amount of required information and specific formatting. Given the extensive number of rules that must be finalized by the Title XIV deadline, we urge the CFPB not to exceed the provisions of the Dodd-Frank Act and to also use its exemption authority to exclude the inclusion of the prepayment amount on the periodic statement, which is provided for by the Dodd-Frank Act. The extensive overhaul proposed would be a massive undertaking and would require coordination between many parties.

Technology vendors would have to define and program for the new and reformatted data, with some requiring significant programming changes. Servicers would need to redesign their statements and input significant amounts of information. Print vendors would need to modify programs, and electronic statements would need to be redesigned--all requiring new programming. Before the changes are implemented, testing would be required. Additionally, contact personnel would require training. Consumers will likely call asking questions as a result of the new statement. The cost will be significant for every company. Servicers indicate that

[152] Proposed § 1026.41(a).

they rarely, if ever, receive complaints about the periodic statements and; the costs significantly outweigh consumer benefits.

MBA was not able to fully vet the proposal with the many technology providers and with large and smaller servicers that have developed their own servicing system technology. The following comments mostly represent views from servicers who are supported by larger technology vendors. If the CFPB decides to proceed with its rulemaking as proposed, we offer the following comments.

A. Loans That Require Periodic Statements

We support the exclusion for reverse mortgages because they do not have periodic payments; and we support the exclusion for HELOCs because they are a different loan product than closed-end loans. The proposed statement would not be suited to handling open-end credit disclosures.

We further support the coupon book exception to the monthly statement requirements for fixed-rate loans, but request certain changes to the proposal which we discuss below.

Periodic statements should not be required for borrowers in bankruptcy, or borrowers who have been referred to or are going through foreclosure. We also believe an exemption from the periodic statement should be provided to all servicers of ARM loans with rate and payment adjustment periods of one year or more. We discuss these issues in greater detail below.

B. Timing and Delivery

According to the Proposed Rule, the first statement would be required to be sent no later than ten days before the first payment is due.[153] The first payment is usually due more than 30 days after closing (because interest is paid in arrears), and this usually gives originators sufficient time to get the servicing to the loan servicer and the loan boarded on the servicer's servicing system. However, there may be certain situations where the servicer may be unable to give a *statement* ten days prior to the first due date. In those cases, the borrower would get a coupon for the first payment at closing along with the proper mailing address. Statements would follow thereafter.

One example of a product with a foreshortened first payment is the FHA loan. FHA Handbook 4155.2 Section 6.A.1.d provides:

> On the purchase of a primary residence, the lender may credit up to seven calendar days of per diem interest to the borrower and have the mortgage payments begin the first day of the succeeding month. This reduces the burden on borrowers whose loans were scheduled to close at the end of the month, but did not, due to unforeseen circumstances.

[153] Proposed § 1026.41(b).

> On a refinance, the lender and borrower may agree to a per diem interest credit of up to 30 calendar days (up to the day prior to the first payment date) and have the mortgage payment begin the first day of the succeeding month.

The CFPB should accommodate these options as they provide a borrower benefit.

According to the proposal, subsequent periodic statements would be required to be delivered or mailed promptly after the payment due date or grace period.[154] Delivering or mailing the statement within four days after the grace period would be considered reasonably prompt.[155]

Expressly Permit "Bill and Receipt" Statements: Proposed Comment 41(a)-3 provides that "only one periodic statement must be sent to the consumer each billing cycle…" We ask that the CFPB expressly provide that servicers may, but are not required to, send more than one statement per month. Many servicers have systems that produce "Bill and Receipt" statements. "Bill and Receipt" statements are produced when the following situations occur: the borrower makes a payment; the borrower incurs a later fee; or a payment is reversed (e.g., NSF). As a result, some borrowers may receive more than one bill per month. These statements are customized with targeted information that is appropriate to the particular circumstance. Bill and Receipt processing allows larger servicers to spread out the production of their monthly statements over the month and gives the borrower an updated billing statement to ensure proper remittance.

Electronic Statements: The proposal would permit electronic delivery of periodic statements,[156] which many consumers prefer. The proposal would require consumer consent to electronic delivery. We request clarification that consumers who have already consented should not need to consent again when the Rule becomes effective. The CFPB states that E-Sign verification procedures are not required because TILA § 128(f)(2) permits electronic transmittal of periodic statements. The only verification requirement in the E-Sign Act that appears relevant is:

> If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).[157]

The periodic statement requirement in the Dodd-Frank Act § 1420 was enacted after the E-Sign Act. We do not believe verification of consumer receipt of an electronic periodic statement is necessary or appropriate. If verification were required and if the consumer did not provide the verification, the servicer would need to mail a paper statement to consumers who prefer electronic statements.

Opt Out of Statements: Many servicers today make detailed account information available online and on mobile devices, in response to customer preferences to have information

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[154] Proposed § 1026.41(b).
[155] Proposed Comment 41(b).
[156] Proposed § 1026.41(c).
[157] 15 U.S.C. § 7001(c)(2)(B).

available at all hours. We suggest that consumers have the ability to opt out of all periodic statements, including electronic statements, after informed consent. This would make for a more modern rule consistent with increasing use of information technology.

C. Content

Payment Amount: The proposal would require disclosure of the payment amount, which the Dodd-Frank Act does not, probably by oversight.[158] We support the proposed requirement to include the payment amount because it is important to consumers.

Escrow Balances: The Proposed Rule would permit including the escrow account balance.[159] The Settlement Agreements require monthly statements to include the current escrow balance,[160] so it is important for this to be permissible.

Additional Information: Servicers would be able to include additional information on the statement that is not required, "as long as the additional information does not overwhelm or obscure the required disclosures."[161] We support this approach for a number of reasons, but we are concerned that without further clarification by the CFPB, this qualification will be used by consumer lawyers in frivolous litigation over well-meaning and useful disclosures. We suggest the commentary indicate several examples.

The proposed rule would permit including information such as payment instructions, without requiring prescriptive content. This minimizes unnecessary regulatory burden and accommodates the differences in payment instructions that servicers use. It would also permit inclusion of machine-readable codes, which are necessary.

Terminology: The proposed statement may use terminology other than that on the statement if the new terminology is commonly understood.[162] This is helpful because it will avoid systems changes for the sake of change alone; for example, "Payment Due" to "Amount Due," two terms that plainly have the same meaning. The Comment gives an example of regional differences in understanding of the word escrow. We request clarification that servicers may use the same terms nationwide even if there is differing regional nomenclature.

1. Prepayment Penalties

One of the most significant difficulties associated with the Proposed Rule for periodic statements, is the requirement to include "[t]he amount of any prepayment penalty that may be charged."[163]

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[158] Proposed § 1026.41(d)(1)(iii).
[159] Proposed Comment 41(c)-1.
[160] Settlement Agreements Appendix A ¶ I.B.5.e.
[161] Proposed Comment 41(c)-1.
[162] Proposed Comment 41(d)-3.
[163] Proposed § 1026.41(d)(7)(iv).

We do not support disclosing prepayment penalty amounts on periodic statements because the disclosure would almost always be inaccurate, the prepayment information does not feed into the periodic statement today, and the information is available elsewhere. The Settlement Agreements do not require prepayment penalty amounts for these reasons. Also, prepayment information is only relevant to borrowers interested in pre-paying their loans and of little interest to borrowers that have no present intent to pre-pay. Thus, the proposed rule would impose an operational burden to over-disclose information that is otherwise available to any borrower upon request.

From a servicing perspective, providing the dollar amount of a prepayment penalty on all loans is problematic due to current system limitations and the complexity of many prepayment calculations. In many cases the technology systems that calculate payoff amounts house prepayment information, but do not interact with the system that produces monthly statements. Additionally, in some situations the prepayment calculations are so complex (with various conditions) they must be calculated and verified manually. Performing manual calculations and verifications is possible upon a pay-off request, but would be unmanageable if applied retroactively to all existing loans on a monthly basis. The final regulation should be explicit that compliance with any prepayment penalty disclosure requirement is, per se, not a UDAP or UDAAP under any circumstances. As a reasonable alternative, we recommend that servicers be permitted to advise consumers that they have a prepayment penalty, when applicable, and indicate on the monthly statement that consumers can call customer service to obtain the exact amount.

From a consumer perspective, providing the prepayment penalty in a monthly statement may mislead borrowers to rely on it for payoff. This would be highly problematic because the amount will vary based on when a prepayment occurs. Including a prepayment penalty amount in a coupon book[164] would exacerbate the problem of producing an inaccurate figure. The prepayment penalty amount is dynamic, and is simply not well-suited for a static disclosure.

In addition, we are concerned with the overbroad definition of a prepayment penalty. The definition of prepayment penalty should exclude:

- FHA interest accrual amortization payments.
- Closing costs the borrower reimburses to the lender for early payoff within 36 months for both senior and subordinate loans.

The CFPB should not define the FHA method of accounting as a prepayment penalty; but if it does, it should coordinate with FHA and Ginnie Mae to resolve the issue first; FHA should revise the model note and Ginnie Mae must reverse its requirement that servicers pass through interest even if the servicer does not collect it. If the CFPB makes a change unilaterally it would cause serious disruptions that are disproportionate to the importance of the issue. The CFPB needs to resolve the matter with FHA and Ginnie Mae before deeming that FHA loans have prepayment penalties.

[164] Proposed § 1026.41(e)(3)(ii), which refers to § 1026.41(d)(7)(iv).

If the CFPB were to treat FHA's interest accrual amortization method as a potential prepayment penalty, it would make all FHA loans HOEPA high-cost loans because any loan with a prepayment penalty permitted after 36 months is high-cost.[165] It would also require all FHA loans to be "Qualified Mortgages" ("QMs") because only QM loans may have prepayment penalties.[166] Yet, prepayment penalties are permitted on QM loans only during the first three years.[167] FHA loans may be paid off after three years, so all FHA loans would be non-QM loans. Non-QM loans "may not *contain terms* under which a consumer must pay a prepayment penalty[.]"[168] That is, *even if a servicer did not charge the fee*, a non-QM FHA loan would violate TILA because of the language in the note permitting the charge. Defining each FHA loan as a TILA violation would create a major disruption based on federal policy. The CFPB's position on this issue could shut down FHA lending at a time when the market is dependent on it.

By contract, FHA borrowers can pay off their loans after three years, on any day of the month the borrower chooses; servicers are required to pass through the interest to Ginnie Mae through the end of the month. As a result, servicers today have the right to collect the interest from borrowers.

Under existing § 1026.23(a)(3), the rescission period is extended if the creditor does not deliver material disclosures. Material disclosures include § 1026.35(b)(2) items, which are prepayment penalties.[169] The 2010 proposal would redefine material disclosure to include prepayment penalties required to be disclosed under § 1026.38(a)(5).[170] There is no § 1026.38(a)(5) today and the 2010 proposal does not contain one. However, the 2010 preamble says:

> The August 2009 Closed-End Proposal would require all mortgage loans to indicate the amount of the maximum prepayment penalty and the circumstances and period in which the creditor may impose the penalty. *See* proposed § 226.38(a)(5). Therefore, the Board proposes § 226.23(a)(5)(i)(F) to include the prepayment penalty disclosed under § 226.38(a)(5) in the definition of 'material disclosures.'[171]

The 2009 proposal in § 1026.38(a)(5) would require disclosure of a prepayment penalty:

> (5) *Prepayment penalty*. If the obligation includes a finance charge computed from time to time by application of a rate to the unpaid principal balance and permits the creditor to impose a penalty if the obligation is prepaid in full, a statement indicating the amount of the maximum penalty and the circumstances and period in which the creditor may impose the penalty.

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[165] Proposed § 1026.32(a)(1)(iii).
[166] TILA § 129C(c)(1)(A).
[167] TILA § 129C(c)(3)(D).
[168] TILA § 129C(c)(1)(A) (emphasis added).
[169] 12 C.F.R. § 1026.23(a)(3)(ii).
[170] 2010 Proposed § 23(a)(5)(i)(F).
[171] 75 Fed. Reg. 58539, 58617 (September 24, 2010).

If the final rule defines an FHA accounting method as a prepayment penalty, it should not apply retroactively to extend the rescission period on existing FHA loans on which creditors complied with Regulation Z.

Again, the impact of retroactively determining that all FHA loans are in violation of TILA would be a major disruption at a time when FHA loans are the only loans available to many borrowers.

Recommendations

We recommend that the CFPB use its statutory exemption authority to not require the inclusion of the amount of a prepayment penalty on the periodic statement or coupon book. Instead allow the servicer to provide a statement that a prepayment penalty exists (when it does) and provide a phone number which the borrower can call to obtain the information.

FHA interest accrual amortization payments and closing close reimbursements should not be defined as prepayment penalties for any purposes.

2. Delinquent Loans

The Proposed Rule would require certain information, grouped together in close proximity and on the first page, on the periodic statement if the loan is 45 days or more delinquent.[172] The information would need to include an account history showing, for the lesser of the past six months or the period since the last time the account was current, the amount due for each billing cycle, or if a payment was fully paid, the date on which it was considered fully paid. The statement would also have to include a warning about the dangers of default; whether the borrower accepted a (trial or permanent) loan modification agreement; reinstatement information; and other disclosures.

The delinquency information will be extremely difficult to provide and in the format required.

Accelerated Loans: The Proposal makes no distinction for loans that have been accelerated or loans in bankruptcy. When loans are accelerated, servicers stop sending periodic statements because the total indebtedness is due and there is no longer a "billing cycle." The borrower is no longer permitted to make monthly payments (without a separate loss mitigation agreement). Sending a periodic statement would be inaccurate, would be inconsistent with the current "billing" status of the loan, and would conflict with the payment options available to the borrower. We would appreciate clarification that a periodic statement or a §1026.41(d)(8) statement is not required for loans that are accelerated.

Loans in Bankruptcy: Servicers must adjust their statements for borrowers who are in bankruptcy. Servicers are generally prohibited from seeking collection of the debt for borrowers in bankruptcy and thus specific language and disclaims are required to be included. Moreover, for borrowers in Chapter 13, payment notices would have to be appropriately designed for pre-petition amounts and post-petition amounts. The proposed periodic statements do not accommodate these complexities. The Settlement Agreements do not require statements for

[172] Proposed § 1026.41(d)(8).

borrowers in bankruptcy and borrowers who have been referred to foreclosure. Borrowers can still request the information at any time. We would appreciate an express exemption from the periodic statement loans in bankruptcy.

Delinquency Box: The delinquency information presents a number of operational difficulties. The delinquency box would need to be included or excluded based on the event of a 46-day delinquency. Adding and removing the box or grouping entirely based on the fact of default is substantially more difficult for systems operations. Additionally, adding the billing history (the amount due from prior billing cycles broken out by each month) to a billing file would be a large and difficult process for many technology vendors producing servicing statements. Instead, servicing systems today are designed to provide cumulative amount due information. Servicers and their vendors would also have difficulty presenting the text to indicate whether a partial payment or a full payment was received. This narrative text is not available today. Servicers should have the ability to simply provide the "last fully paid installment date," and aggregate amount due, rather than recant each month that a payment remains due and unpaid.

Reinstatement Amounts: Similar to the problems with providing payoff amounts, servicers will be unable to provide accurate reinstatement figures on every delinquent periodic statement because of lagging third-party charges. Borrowers would be unable to rely on stated figures. As a result, we request that that information be removed from the delinquency statement. Alternatively, the servicer could disclaim the accuracy of the amount listed on the statement. However, this defeats the purpose of including the information at all. A preferable approach is to indicate that the borrower may call a number designated in the letter to get a reinstatement figure.

Recommendations

We urge the CFPB to provide an exemption from the periodic statement under § 1026.41(e) for loans that have been accelerated and loans in bankruptcy.

We urge the CFPB to remove §§ 1026.41(d)(iv) and (vi).

We suggest noting the fact of delinquency on the first page, with a reference to additional information on other pages as necessary.

We suggest allowing cumulative figures for amounts due as an alternative to itemizing each missed payment.

3. Year-to-Date Payments

The proposal would require in the Past Payments Breakdown, a breakdown of year-to-date ("YTD") payments by calendar year.[173]

Servicing Transfers: The Proposal does not address what occurs in the event of a servicing transfer. Requiring YTD information for the entire year by the transferee servicer would create a

[173] Proposed § 1026.41(d)(3)(ii).

significant problem. The CFPB must permit servicers to disclose YTD information for their period of servicing. This is consistent with IRS requirements for reporting interest on Forms 1098. When servicing transfers during the year, the IRS permits each servicer to report only the amount of interest it received during the year, so the borrower receives two Forms 1098 at year-end--one from each servicer.[174] If the CFPB creates an inconsistent rule the transferee servicer would need to separately track interest paid--once for IRS purposes and again for Regulation Z purposes. Many servicers do not have that capacity today to track a previous servicer's YTD information.

Fees: Today, not all servicers have a means to include corporate advances as "fees" on the periodic statement. These advances include third-party costs that the servicer will be reimbursed for by the investor if the borrower does not pay them, such as property preservation fees. Presenting this type of information on the periodic statement as "fees" will require significant new coding, uploading of information, and reprogramming. Servicers also cannot produce YTD figures on corporate advances that are not considered "fees" in their servicing systems today. YTD information is typically provided as a courtesy to borrowers for purposes of tax planning and escrow balance tracking. Including YTD figures for miscellaneous fees and corporate advances may confuse and mislead consumers.

Historical Information: Most servicers provide a history of prior periodic statements on-line. Financial transaction activity for a consumer is typically available on prior statements and on the servicer's customer-facing website. Consumers, therefore, can review previous statements or their account information for items of particular interest such as late fees and other miscellaneous fees assessed or paid. Providing YTD information for all transaction activity on every statement is not critical. Borrowers can also call customer service or access automated phone VRU systems for this information.

Recommendation

Servicers will have significant difficulties in providing YTD information beyond principal, interest, escrows (received from the borrower) and late fees. Year-to-date information should be limited only to these items.

Year-to-date information should be limited only to transactions applicable to the period of time the servicer serviced the loan.

4. Transaction Activity

The Proposed Rule would require disclosing all transaction activity since the last statement.[175] The form displays this in a box on the first page. We request flexibility to include it on a subsequent page as some servicers currently do. The cost of moving the information from one

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[174] 2011 Instructions to Form 1098 on page 2 provide:

> Generally, if you receive reportable interest payments (other than points) on behalf of someone else and you are the first person to receive the interest, such as a servicing bank collecting payments for a lender, you must file this form. . . . You must file this form even though you do not include the interest received in your income but you merely transfer it to another person.

[175] Proposed § 1026.41(d)(4).

page to another would be without benefit. The CFPB's consumer testing shows that consumers, if they look at their monthly statements, do look for and find this information.[176] There is no need to move it.

If the list is too long to fit on the first page, it would have to be included on a subsequent page. This is a rare occurrence, but it can happen. Lengthening the page may not be possible on some servicing systems.

We also request that if a transaction is entered then reversed in the same billing cycle, in the same dollar amount, that it be permissible to exclude it. This is important because certain corrections are made by temporary moving items to suspense while correction occurs. Indicating these debits and credits would simply be inaccurate and would be extremely misleading to the borrower.

Servicers will have difficulty listing all fees, especially those that are considered corporate advances on the periodic statement. Moreover, some fees will lag after they are incurred due to third party billing.

The rule defines transaction activity as "any activity that credits or debits the outstanding account balance."[177] The commentary gives examples, including a partial payment sent to a suspense account.[178] A partial payment sent to a suspense account neither debits nor credits the account. As a result, the proposed rule and commentary are inconsistent. The Settlement Agreements require showing activity in a suspense account.[179]

Recommendations

We recommend permitting transaction activity to be includable on subsequent pages, and that if a transaction is reversed in one billing cycle that it not be required to be included.

We suggest clarification that suspense account activity for the prior month is to be included in the transaction activity.

5. Housing Counselor and State Housing Finance Authority Information

The proposed rule would require disclosure of the CFPB's or HUD's list of homeownership counselors or counseling organizations.[180] This approach is far superior to the approach in the SBREFA Outline that would have required contact information for three counseling programs in the state where the property is located (or where the statement is mailed). It is also better than the proposal in the high-cost mortgage rulemaking that, within three days of application, a

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[176] ICF International, *Summary of Findings: Design and Testing of Mortgage Servicing Disclosures*, p. iv – v (August 2012).
[177] Proposed § 1026.41(d)(4).
[178] Proposed Comment 41(d)(4)-3.
[179] Settlement Agreements ¶ I.B.3.a.(1).
[180] Proposed § 1026.41(d)(7)(vi).

lender must disclose a list of five homeownership counselors or counseling organizations located within the "closest" zip code.[181]

The proposal, however, also requires the website, if applicable, and a phone number for a SFHA for the state in which the property is located. The Dodd-Frank Act, however, requires the disclosure of either the homeownership counselor information *or* state housing finance authority.

Recommendations

We applaud the CFPB for permitting the use of its website and phone number or HUD's website and phone number for homeownership counselors and counseling organizations.

The CFPB should follow the Dodd-Frank Act and permit the inclusion of either the housing counseling information or the state finance authority information on the periodic statement, but not require both.

D. Coupon Book Exemption

Under the coupon book exception, proposed § 1026.41(e)(3)(ii)(A) would require that coupon books contain the information in paragraph (d)(7). This includes information not commonly appearing on coupon books and that, as a practical matter, could not be printed on coupon books annually, such as the outstanding balance and prepayment penalty amount. We recommend that those items be available through customer service and through other means consistent with the process for items listed in §1026.41(e)(3)(iii).

Trigger for Certain Information: Under §1026.41(e)(3)(iii), the rule would require the servicer to make available, "by telephone, writing or electronically, if the consumer consents" the explanation of amount due, the past payment breakdown, and the transaction history.[182] This does not make clear what would trigger these disclosures. We suggest it should be consumer request. Anything else would diminish or eliminate the coupon book exemption, which is statutory, and which is included in the Settlement Agreements. It is unclear why this is necessary, in light of the proposed § 1024.36 information requests rule.

Periodic Delinquency Disclosures: The Proposed Rule requires a servicer who sends coupon books to begin sending periodic delinquency statements when the borrower is 45 days delinquent. The information required is the same as that required by § 1024.41(d)(8) for delinquent borrowers receiving periodic statements. Therefore, the same problems are present here as those mentioned above. We do not restate those recommendations. Periodic statements can impose significant burdens on servicers, especially on smaller servicers because they require more technology support, monthly production, additional mailing, and third-party costs. Therefore, transitioning to a periodic statement for delinquent borrowers—albeit much abbreviated--will be difficult and costly. Moreover such "statements" will be in addition to state-required default notices, but slightly different in content and appearance, since most state laws have very specific requirements for content and font type.

[181] Proposed § 1024.20(a), 77 Fed. Reg. 49090, 49148 (August 15, 2012).
[182] Proposed § 1026.41(e)(3)(iii).

Coupon Books for One-year ARMs: Coupon books provide a lower cost alternative as the Dodd-Frank Act recognized. MBA requests that the CFPB consider using its exemption authority under 105(a) and DFA 1405(b) to allow *all servicers* to use coupon books for ARMs with note interest rates and payments that adjust once a year or less frequently and that are fully amortizing.[183] In these cases, the loans necessitate a new coupon book only once a year, similar to fixed-rate loans. The savings is significant and it would not change the quality of the information delivered or available to the borrower.

Recommendations

See discussion above regarding our concerns with periodic statements for delinquent borrowers.

Other than the current interest rate, we recommend moving the items required under § 1026.41(e)(3)(ii)(A) to § 1026.41(e)(3)(iii).

We recommend that the CFPB consider a coupon book exemption from the periodic statements for certain ARMs with rate change periods of one year or more.

E. Small Servicer Exemption from Periodic Statement

We support exempting small servicers from § 1026.41, but request a different definition of small servicer as mentioned above. Servicers exempt from the periodic statement requirement would continue to offer appropriate billing information in a passbook, coupon book, or periodic statement, but would not have to conform to the details provided for in the Proposed Rules. This is appropriate since borrower would still receive the appropriate information necessary to make payments.

CONCLUSION AND REQUEST FOR MEETING REGARDING INFORMATION AND TECHNOLOGY MANAGEMENT

MBA appreciates the CFPB's efforts in developing the Proposed Rule on Mortgage Servicing. We believe that if this Proposed Rule is implemented correctly, the industry will have the ability to continue to robustly provide homeowners with proper information about their mortgages and with home retention and loss mitigation options. As an industry, this continues to be a high priority.

After a thorough review of the Proposed Rule, we believe it would be mutually beneficial for all parties involved if the CFPB held a day-long meeting about challenges relating to information and technology management. The focus would be on proposed forms production and data management, including the periodic statement, ARM disclosures, servicing file, and record retention requirements. A joint meeting with the mortgage industry stakeholders involved in the implementation process would allow the industry to work together to better help consumers.

[183] Our proposal would include within the exemption, teaser rate periods provided the coupon book reflected when the payment increases.

Should you have questions or wish to discuss any aspect of these comments further, please contact Vicki Vidal, Associate Vice President of Loan Administration, at (202) 557-2861 or via email at vvidal@mortgagebankers.org.

Again, we greatly appreciate the opportunity to comment and we look forward to further discussion on these important issues.

Sincerely,

David H. Stevens
President and Chief Executive Officer
Mortgage Bankers Association