

July 29, 2014

Ms. Kelly Cochran
Assistant Director for Regulations
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

Re: Clarifications to Mortgage Servicing Rules

Dear Ms. Cochran:

The American Bankers Association¹ appreciates the CFPB's ongoing efforts to clarify its mortgage servicing regulations and accompanying staff commentary. Our members also appreciate CFPB's efforts to verbally respond to interpretive questions from individual bankers. As our member banks have worked to refine their implementation of the new servicing rules, they have identified additional questions and concerns needing clarification or regulatory amendment. ABA requests that CFPB address these issues in regulatory guidance (or regulatory amendment where necessary) that is readily accessible to all servicers, their vendors and advisors, as well as examiners from other regulatory agencies that will examine banks for compliance with the CFPB rules. Our requests for clarification are described below.

1. Scope of Clarifications and Revisions

While ABA welcomes targeted revisions to the servicing rules, we request that any regulatory changes not necessitate major systems modifications. In the past year, banks have invested heavily in technology to support compliance with CFPB servicing requirements and other mortgage-related rules. Due to vendor delays, many banks are still working to test and improve these systems. Regulatory revisions requiring major systems changes would interfere with bank efforts to refine implementation of the existing rules. Banks are also beginning to devote significant time and resources to comply with the new TILA/RESPA Integration rules that will go into effect August 1, 2015. The capacity of depository institutions, particularly community banks, to handle additional labor-intensive systems and operational changes is severely limited at this time.

2. Rolling Delinquencies: The 120-Day Rule

Background. 12 C.F.R. 1024.41(f) prohibits a servicer from making the first notice or filing for foreclosure unless a borrower's mortgage loan obligation is more than 120 days delinquent. Many ABA members have inquired as to how this "120-Day Rule" applies to "rolling delinquencies." Rolling delinquencies occur when delinquent borrowers resume making

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$185 million in assets. Learn more at aba.com.

payments on the loan without making up for past missed payments. In some cases, the borrower may start and stop making payments multiple times. Even though the borrower may resume making scheduled monthly payments, s/he never becomes fully current on the loan and is unresponsive to loss mitigation outreach efforts. The CFPB's servicing regulations do not specify how a servicer is to calculate delinquency for purposes of the 120-Day Rule.

ABA Feedback. ABA requests that CFPB provide guidance on how the 120-Day Rule applies to rolling delinquency situations. We appreciate the CFPB's objective of ensuring that delinquent borrowers have sufficient time to submit a loss mitigation application prior to a servicer's commencement of a foreclosure action. What is seemingly a simple regulatory requirement in theory becomes complicated to apply on a day-to-day basis, particularly with respect to rolling delinquencies.

ABA members need regulatory certainty regarding how to apply the 120-Day Rule. The need for regulatory certainty is underscored by the private right of action that enables borrowers to enforce this requirement. In response to industry inquiries on how to treat rolling delinquencies, CFPB has informally recommended that banks look to common interpretations of delinquency, as found in best practices, industry standards, state law, and contract law. CFPB has also suggested that a servicer may accelerate the mortgage loan if permitted under state law and the loan contract. If the borrower does not repay the full amount after acceleration, the servicer may commence foreclosure after 120 days. Rather than leave it to the courts to determine whether a bank has correctly determined that a borrower is more than 120-days delinquent, we request that CFPB specify how the 120-Day Rule applies to rolling delinquencies. Given the potential legal risks involved, banks are very hesitant to rely solely on oral, unofficial guidance from CFPB staff on this issue.

ABA is in the process of surveying its members to quantify the frequency of rolling delinquencies and the reasons why they occur. The survey will also examine how banks are managing rolling delinquencies in light of the 120-Day Rule. Anecdotal feedback from ABA members signals that rolling delinquencies constitute a sizeable percentage of delinquent loans – particularly for portfolio lenders. Preliminary indications are that industry practices pertaining to rolling delinquencies and associated economic incentives are not one-size-fits-all. As a result, investors and portfolio lenders appear to handle rolling delinquencies differently. ABA will share the survey results with CFPB when the data analysis is complete.

3. Charged-Off Loans

Background. As described in our [November 22, 2013 comment letter](#), ABA members have encountered many obstacles in creating periodic statements for mortgage loans that have been charged-off. Our November letter explains the potential for borrower confusion as well as some of the practical problems associated with providing periodic statements for charged-off accounts. Challenges involving periodic statements for these accounts are continuing because 1) many banks did not interpret the periodic statement requirement to apply to charged-off loans until late 2013 when the CFPB began to publicly share its interpretation of the periodic statement requirement and 2) it has not been industry standard or best practice to provide periodic

statements for charged-off mortgage loans. As a result, banks and their vendors have had difficulty in developing IT solutions that align servicing platforms, collection systems, and collections attorneys' records in a manner that produces periodic statements that comply with 12 C.F.R. 1026.41(d).

ABA Recommendation. ABA reiterates its belief that servicers should not be required to provide periodic statements that meet the content requirements of 12 C.F.R. 1026.41(d) for mortgage loans that have been charged off. However, if CFPB continues to require periodic statements for charge-offs, we believe there may be value in adopting a provision that parallels the periodic statement exemption for open-end credit. 12 CFR 1026.5(b)(2)(i) provides:

The creditor shall mail or deliver a periodic statement as required by § 1026.7 for each billing cycle at the end of which an account has a debit or credit balance of more than \$1 or on which a finance charge has been imposed. A periodic statement need not be sent for an account if the creditor deems it uncollectible, if delinquency collection proceedings have been instituted, if the creditor has charged off the account in accordance with loan-loss provisions and will not charge any additional fees or interest on the account, or if furnishing the statement would violate Federal law.

This approach would align the periodic statement requirement with existing regulations and would take into account some of the difficulties associated with providing periodic statements for charged off accounts. This limited exemption would also address some of the questions (discussed below) that ABA members have raised regarding how to apply the periodic statement requirement.

Requests for Clarification.

- *Scope.* We request that CFPB clarify the scope of the periodic statement requirement for charged off loans. For example, is it CFPB's expectation that banks provide periodic statements for all mortgage loans that it has charged off? Are statements required for loans that were charged off two years ago? Five years ago? Providing periodic statements for all loans that have been charged off is problematic. For example, sending a periodic statement to a customer with whom a bank has had little to no communication for a long period of time would increase borrower complaints and expose the bank to heightened reputation risk. For this reason, we request that the periodic statement requirement apply only to loans that a bank charges off on or after January 14, 2014.
- *Loss of Contact with Customers.* Customers whose mortgage loans have been charged off do not normally provide the servicer with a forwarding address. In this situation, mailing any type of periodic statement would not be beneficial. We request CFPB to clarify that servicers do not have an obligation to continue mailing periodic statements that are returned "undeliverable."
- *Court-Ordered Judgments.* In some situations, banks seek and are granted court-ordered judgments on charged-off loans. The amount that the court awards may or may not equal the principal balance and may or may not include interest. The court determines the

amount due and the payment schedule. The loans are no longer collected under the terms of the original note. Rather, they are collected by the court. We request that CFPB clarify that a bank does not have an obligation to provide a periodic statement in this situation.

4. Bankruptcy

On October 23, 2013, CFPB issued an [Interim Final Rule](#) providing limited exemptions from the servicing rules in situations where a borrower has filed for bankruptcy. CFPB concluded that further analysis and study of the intersection of bankruptcy law, the Fair Debt Collection Practices Act, and CFPB rules was necessary, but could not be completed before the servicing rules took effect in January 2014. As stated in our November 22, 2013 [comment letter](#), ABA strongly supports the exemptions set forth in the Interim Final Rule and we urge the CFPB to finalize the Interim Final Rule as published. In the event that CFPB elects to issue a final rule that does not include the current exemptions, we strongly recommend that CFPB engage in a notice and comment process that will allow servicers to provide input on the rule before it is finalized. Bankruptcy law and associated servicer operational processes are highly complex. As a result, a rulemaking on this issue that differs from the current Interim Final Rule would benefit from a public comment period.

5. Conclusion

ABA appreciates the CFPB's willingness to engage in ongoing discussions as banks identify questions and concerns regarding the servicing rules. As CFPB considers refining its servicing rules and commentary or otherwise interpreting the new servicing rules, we reiterate the importance of making CFPB interpretations readily available to all servicers, their vendors and consultants, and other regulatory agencies. ABA reaches tens of thousands of bank CEOs, compliance professionals, lenders, operations personnel, and attorneys every day. We stand ready to work the CFPB to serve as a conduit of information in this regard. Should you have any questions, please contact Krista Shonk at kshonk@aba.com.

Sincerely,



Robert R. Davis

cc Laura Johnson, Senior Counsel, Office of Regulations, CFPB
Laurie Maggiano, Program Manager for Servicing and Securitization Markets, Division of Research, Markets, and Regulations, CFPB
Whitney Patross, Counsel, Office of Regulations, CFPB