MORTGAGE BANKERS ASSOCIATION

March 16, 2015

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

RE: Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)
Docket Numbers CFPB-2014-0033; RIN 3170-AA49

Dear Ms. Jackson:

The Mortgage Bankers Association[1] (MBA) appreciates this opportunity to submit comments to the Consumer Financial Protection Bureau (CFPB) on its Proposed Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (together, the Proposed Amendments).

At the outset, we note that some of the proposed rules are in response to industry's requests for clarification on to the current Mortgage Servicing Rules. MBA commends the CFPB for addressing implementation challenges raised by stakeholders following the January 2014 rule implementation and appreciates the engagement process that led to these proposals.

Please see below for MBA's comments on the Proposal. The comments are organized as follows:

[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 more than 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.mba.org.

I. SUCCESSORS IN INTEREST

The CFPB proposes to significantly expand the regulatory requirements related to successors in interest as well as the types of transfers that would be covered under the servicing rules, citing ongoing concern over servicers' practice with respect to successors in interest. The proposed changes would apply to both Regulation X and Regulation Z servicing requirements and would apply regardless of whether the successor in interest has assumed the loan under state law or is otherwise obligated on the loan. MBA has numerous concerns with the proposed expansion of the scope of the successor in interest rules, the legal risk of identifying and confirming a successor's ownership interest in a property and the application of the mortgage servicing rules to non-obligors.

MBA Concerns:

1. Co-owners are not "successors in interest."

The proposed rules would extend rights and protections under the mortgage servicing rules to individuals to whom a borrower has transferred an ownership interest (to a spouse, child, or trust, for example) as co-owners. The proposed rules would define a successor in interest to cover all categories of transfers protected under the *Garn-St. Germain Depository Institutions Act of 1982* (*Garn-St. Germain Act*).[2] Transfers where the spouse or children of the borrower become an owner of the property and transfers into an inter vivos trust do not involve a succession of interest as the borrower retains ownership rights and remains obligated on the loan (*i.e.*, the "successor" does not take the place of the borrower).

The proposed rules do not distinguish between situations in which one borrower is still alive (and still obligated on the loan) and situations in which a borrower is either deceased or no longer retains ownership rights (such as an ex-spouse).

[2] In addition to transfers resulting from the death of a borrower and transfers by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety, protected transfers under the *Garn-St Germain Act* also include transfers where the spouse or children of the borrower become an owner of the property, transfers resulting from a decree of dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, transfers into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy of the property, and any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.

Extending the same rights and protections under the mortgage servicing rules to individuals to whom a borrower has transferred an ownership interest in such situations raises serious privacy concerns. Under the CFPB's proposal, a non-obligated co-owner would be considered a "borrower" for the purposes of Regulation X servicing rules and a "consumer" with respect to Regulation Z mortgage servicing rules. Servicers would be required to comply with the mortgage servicing rules with respect to both a borrower obligated on the loan and the non-obligated co-owner. The proposal is silent on how servicers should handle competing claims or contradictory instructions from non-obligated owners.

Placing a non-obligated owner on the same footing as the obligated owner raises significant privacy concerns as the process could be exploited in contentious divorces, contested wills or other situations where a party may seek personally advantageous financial information. The proposed rules could potentially require a servicer to respond to a variety of account-related inquiries by providing private and confidential borrower account information to non-obligated third parties contrary to consumer privacy protections such as those found in Regulation P[3] and the *Gramm-Leach-Bliley Act*.[4]

2. Regulation X and Regulation Z rights should not be extended to successors in interest who have not assumed the mortgage loan.

Even in situations in which a borrower is deceased or no longer retains ownership interest in the property, the CFPB should not issue rules that give a successor in interest a private right of action against a servicer when they have not assumed the loan and thus have no obligations or defined contractual relationship with the servicer. Amending the definitions of the regulation to add successors in interest as beneficiaries is contrary to original understanding of the relationships implicated by regulation and loan documents.

Any expansion of the protections of Regulation X and Regulation Z - some of which carry a private right of action - to individuals who are not obligated on the mortgage loan must be made with careful consideration of the impact on other federal consumer protection laws.

3. Confirmation of a successor in interest's ownership status is a legal determination.

The proposed rules would require a servicer to "confirm the ownership interest" of a successor in interest. Confirmation of a successor in interest's ownership interest is a legal determination, which is made in accordance with applicable state property, probate, and/or family law. There are a vast number of potential circumstances in which one or more parties may claim to be a successor in interest and servicers should not be put in the position of rendering legal determinations as to the validity of a potential successor's ownership interest, particularly when there are competing legal claims from

[3] 12 CFR §1016
[4] 14 U.S.C. §6801

other parties. Servicers cannot "confirm" ownership interest with the level of legal certainty that would be required in order to treat the successor as a borrower or consumer under the Mortgage Servicing rules. Should the Bureau believe it is necessary for servicers to perform this function, it should provide a clear safe harbor from any liability that may arise from a good-faith erroneous determination, including but not limited to any privacy claims.

MBA Comments:

1. *Scope of Successor in Interest Provisions:* The CFPB should narrowly tailor the scope of the successor in interest provisions to situations in which the successor takes the place of the borrower - where the successor inherits the property after the death of the borrower, has been awarded the property in a divorce, or has received a quitclaim deed from the borrower, for example - and not include transfers in which the borrower's ownership interest and obligation remain intact. MBA therefore urges CFPB not to include these categories in the definition of successor in interest. If the prior borrower remains obligated on the loan, the CFPB should not extend the same rights and protections under the mortgage servicing rules to non-obligated third parties.[5]

2. *Required Documents to Establish Interest in Property*: The CFPB proposes to require servicers to respond to a broad range of written communications from potential successors in interest by providing information regarding the documents required for confirmation of status within the response times under the request for information provisions found in §1024.36(c) through (g).

Under this framework, servicers would be required to respond to any written request that indicates the person submitting the request may be a successor in interest, including a loss mitigation inquiry from a person other than the borrower. While the CFPB anticipates that many requests under proposed §1024.36(i) will indicate the nature of the transfer of the ownership interest from the prior borrower to the successor in interest, not all situations will be clear and a servicer may be unable to determine the requisite documentation for confirmation based on the written communication provided by a successor in interest.

MBA believes that the current rules and guidance are sufficient and that concerns over servicer practices can be addressed through the examination and guidance processes. Under the current rules, servicers are required to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon the notification of the

[5] The CFPB is seeking comment on whether prior borrowers should continue to receive protections once a successor in interest is confirmed. MBA believes that borrowers who retain ownership and remain obligated under the mortgage loan should receive the protections of the mortgage servicing rules. The CFPB also seeks comment on other situations besides death or release of obligation in which a servicer should not be obligated under the mortgage servicing rules with respect to prior borrowers In cases of divorce (or through a property settlement agreement) where property is awarded to one party, the other party usually remains obligated under the loan as releases of liability in these cases are rare. MBA suggests that in such situations, a servicer should not be obligated under the mortgage servicing rules with respect to the party that no longer has an ownership interest in the property.

death of a borrower, promptly identify and facilitate communication with the successor in interest.[6] To accomplish this, servicers must promptly provide "a list of the documents or other evidence the servicer requires, which should be reasonable in light of the laws of the relevant jurisdiction, for the party to establish (1) the death of the borrower and (2) the identity and legal interest of the successor in interest."[7] Upon receipt of sufficient evidence to support the individual's claim to an ownership interest in the property, servicers provide the successor in interest with basic loan level information in order for the successor to make an informed decision of how to proceed on the loan obligation. Should the CFPB extend the scope to cover all protected transfers under the *Garn St. Germain Act*, it must provide a safe harbor to servicers if servicers will be required to provide nonpublic borrower information to a non-obligated co-owner.

MBA strongly urges the CFPB not to enact the proposed rules regarding confirmation of a successor in interest's identity and ownership interest. However, should the CFPB move forward with its proposal to require servicers to comply with the Request for Information requirements for potential successors in interest, the CFPB should limit servicers obligations to written communications that specifically request information related to confirming status as a successor in interest or that indicate the nature of the transfer of ownership interest from the prior borrower and that are received at the servicer's designated address (if applicable). Requiring servicers to respond to requests received from potential successors in interest at any location would be extremely difficult to operationalize and would increase the likelihood of a request being inadvertently overlooked.

The Bureau notes that it is considering requiring servicers to provide information requested by a potential successor in interest upon confirmation of the successor's status. Preserving information requests received from potential successors in interest in order to respond upon confirmation would require significant and costly systems changes.

3. *Loss Mitigation*: The proposed rules would require servicers to review and evaluate a loss mitigation application received from a confirmed successor in interest. As discussed above, MBA believes it is inappropriate to extend the loss mitigation protections to non-obligated co-owners in situations in which the obligated borrower is still alive and retains an ownership interest in the property.

Successors in interest who stand in the place of the prior borrower -- *i.e.*, who have inherited a property after the death of the borrower, have been awarded a property in a divorce action, or have received a quitclaim deed from the borrower, and who *occupy the property as their primary residence* should receive information on loss mitigation options before being required to assume a loan. However, loss mitigation reviews are extensive, expensive and require significant system resources and the proposed rules would require the evaluation to take place before it is clear that the successor is willing to assume the obligation. Though the intent may be to preserve the optionality for a

[6] §1024.38(b)(1)(vi)
[7] CFPB Bulletin 2013-12 (Implementation Guidance for Certain Mortgage Servicing Rules)

successor to avoid assuming the loan, sequencing the process in this manner could turn the loss mitigation review from a collaborative exercise seeking to assist the borrower into a confusing and unclear process, particularly if there are multiple successors in interest. We would propose that the rule be amended to require that a servicer only be required to complete a loss mitigation evaluation for a borrower that would be obligated under the mortgage instruments.

4. *Periodic Statements*: Under the proposed rule, servicers would be required to send a periodic statement to a confirmed successor in interest. As the proposal is currently drafted, a servicer would be required to provide a periodic statement that includes nonpublic borrower account information to a non-obligated co-owner. As discussed above, this raises significant privacy concerns. MBA would not oppose the requirement to provide a confirmed successor in interest with periodic statements if the CFPB narrowed its proposed definition of successor in interest to situations in which the prior borrower is deceased or no longer retains an ownership interest in the property.

As proposed, a servicer would only be required to provide one periodic statement per loan; however, the CFPB notes it is considering requiring servicers to provide periodic statements to each successor in interest. MBA would not support such a requirement as providing periodic statements to multiple successors in interest *who are not obligated to make payments* would be extremely burdensome and require significant systems changes to add entirely new and custom fields.

II. DEFINITION OF DELINQUENCY

The CFPB proposes to add a general definition of delinquency that would apply to all of the servicing provisions of Regulation X and the periodic statement provisions of Regulation Z. Under the proposed definition, a loan is delinquent beginning on the date a payment sufficient to cover principal, interest, and if applicable, escrow becomes due and unpaid. The Bureau also proposes to add an additional comment, §1024.31-3 to permit servicers to apply a payment tolerance under certain conditions.

MBA Comments:

While the Bureau intends the definition to provide clarity to servicers and borrowers, the proposed rule appears to use the terms ‘delinquent’ and ‘default’ interchangeably in the preamble and in the proposed comment §1024.39(a)(6).[8] CFPB rules pertain to delinquency, not default, and CFPB should limit its definition to ‘delinquency.’ Whether a loan is in ‘default’ is defined elsewhere: in the loan documents, FHA regulations and

[8] Compliance with §1024.41. A servicer complies with § 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact if the servicer has established and is maintaining ongoing contact with the borrower with regard to the borrower’s completion of a loss mitigation application or the servicer’s evaluation of the borrower’s complete loss mitigation application, or if the servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation options. However, the servicer must resume compliance with the requirements of §1024.39(a) for a borrower who cures a prior ***default*** but becomes ***delinquent*** again. 79 F.R. 74292 (emphasis added).

GSE Guidance. Moreover, the term 'default' could encompass non-payment breaches of contract (e.g. for waste) which are not and should not be the subject of the definition of 'delinquency' in this section.

With respect to payment tolerances, we suggest deleting the language "…*that elects to advance the missing funds to the borrower's mortgage loan account*…" as not all servicers apply payment tolerances by advancing funds. For example, servicers that follow GSE requirements will 'short' the escrow portion of a payment within a certain tolerance to permit the payment to be applied. That shortage is then billed to the loan through the escrow account if not paid by the borrower.[9]

III. REQUESTS FOR INFORMATION

MBA supports the Bureau's proposed amendments to the information request requirements that would permit servicers to provide only the name and contact information for Fannie Mae or Freddie Mac without also providing the name of the trust, unless an information request expressly requests the name or number of the trust or pool. The proposed change would ease the burden of requesting the trustee for this information each time a request from a borrower is made.

IV. FORCE-PLACED INSURANCE

MBA supports the Bureau's proposed amendment to the required disclosures to account for when a servicer wishes to force-place insurance when the borrower has insufficient, rather than expiring or expired, hazard insurance coverage and giving servicers the flexibility to include a borrower's loan account number on the notices required under §1024.37.

V. EARLY INTERVENTION

A. Live Contact

The proposed amendments clarify a servicer's recurring obligation to make good faith efforts to establish live contact when a borrower is delinquent for one or more billing cycle and codify guidance from the October 2013 bulletin permitting servicers to combine contact attempts for collection and provision of loss mitigation options. Servicers would remain exempt from the live contact requirements for borrowers in bankruptcy, borrowers who share liability with a debtor in a Chapter 12 or 13 Bankruptcy or borrowers who have been discharged from personal liability. However, servicers would be required to comply with the live contact requirements for borrowers who are jointly liable with a debtor in a Chapter 7 or 11 Bankruptcy case.

The exemption from the live contact requirements for borrowers who have invoked cease communication rights under the Fair Debt Collection Practices Act (FDCPA) remains in effect, however the proposed rules clarify that to rely on the exemption, a

[9] Freddie Mac Seller/Servicer Guide 51.18 – Application of Payments: differences in collection.

servicer must have received a cease communication request and act as a debt collector under the FDCPA with respect to the loan.

<u>MBA Comments</u>:

MBA urges the CFPB to leave the current exemption from live contact for loans or borrowers in any Bankruptcy Chapter. Whether an action violates the automatic stay or discharge injunction is governed by the Bankruptcy Code. These regulations are a complex interaction of different laws, state requirements and local rules and as such it is unclear how these proposed changes would interact, possibly exposing servicers to liability for following the proposed rules. While it is true there is no co-debtor stay protection for Chapter 7 and 11 borrowers, it would be impossible to guarantee that the actual borrower in bankruptcy would not be contacted, thus exposing servicers to possible stay or discharge injunction violations.

B. Written Notice

1. *FDCPA:* The CFPB proposes to amend the current exemption from the Early Intervention written notice requirement for borrowers who have invoked the cease and desist protections under the FDCPA. While the exemption for the live contact requirement remains, the proposed rules would require servicers to provide a modified written early intervention notice if loss mitigation options are available.

For borrowers in bankruptcy who have invoked FDCPA protections and are represented by counsel, servicers would be required to send the modified notice to the borrower's attorney. If a borrower has sent a cease communication request to a servicer but initiates communication about loss mitigation, the servicer would be prohibited from making a request for payment, including initiating conversations with the borrower related to repayment of the debt (through a debt payment plan or otherwise). Only if the borrower, without prompting from the servicer, inquires about or requests to make a payment or initiates discussion about possible payment plans other than as part of the loss mitigation, can a servicer engage in discussions related to payment of the debt. Servicers may not begin or resume contacting the borrower unless the borrower consents or revokes a prior cease communication request.

The CFPB notes that servicers may only rely on the exemptions if the servicer is subject to the FDCPA and the borrower has properly sent the servicer a written cease communication notice. The proposed amendments would provide a safe harbor under the FDCPA subject to a forthcoming advisory opinion of the CFPB.

2*. Bankruptcy*: Servicers would be required to provide written early intervention notices to all borrowers in bankruptcy if loss mitigation options are available unless: 1) the borrower's confirmed bankruptcy plan provides for the surrender of the property or avoidance of the lien, or does not provide for the payment of pre-bankruptcy arrearages or maintenance of payments due under the loan; 2) the borrower files a statement of intent to surrender the property; or, 3) the court enters an order avoiding the lien or lifting the automatic stay.

A servicer must resume compliance with the early intervention requirements for the first delinquency after the case is dismissed or closed, or if the borrower reaffirms the loan or receives a discharge. There is no requirement to resume compliance in a fashion that would violate applicable law or a court order in bankruptcy case.

3. Servicing Transfers and Successors in Interest: The proposed rules would require transferee servicers to send the Early Intervention written notice, even if the transferor servicer previously provided the written notice to the borrower. A servicer would not need to provide a successor in interest with the written notice if the borrower already received it however, if the written notice requirement is again triggered, the notice must be provided to the successor in interest.

MBA Comments:

1. FDCPA: As the CFPB has acknowledged,[10] the early intervention requirements[11] are not statutorily mandated by the Dodd-Frank Act and are not in response to a borrower-initiated communication, and thus the interplay between §1024.39 and the cease communication provisions of FDCPA § 805(a) is unclear. The proposed rules carve out an exception to the current exemption but do not clarify the legal status of communications required under the servicing rules with respect to the FDCPA, thus providing fertile ground for litigation.

Modifying the notice as proposed does not eliminate this exposure to servicers, nor does it provide useful information to the borrower. Most state laws and investor/insurer rules require servicers to send notices to borrowers prior to the initiation of the foreclosure process. Including a statement that a servicer intends to invoke its remedy of foreclosure in an early intervention notice may be perceived by borrowers as offensive or aggressive and may discourage a borrower from reaching out to the servicer to request assistance.[12]

As a final comment, MBA notes that applying the FDCPA to mortgage servicers is unnecessary given the extensive borrower protections found in the new Servicing Rules and risks unnecessarily complicating the process for borrowers, mortgage servicers, and the Bureau. As the Bureau moves forward with this proposal and its FDCPA (Regulation F) rulemakings, it should strive to ensure that the robust borrower protections found in the Servicing Rules apply to all borrowers equally, without regard for loan status upon acquisition. To accomplish this, MBA respectfully recommends the Bureau set a bright line for the application of the FDCPA by noting that the Servicing Rule requirements already protect borrowers regardless of loan status upon acquisition and that FDCPA requirements only attach in the mortgage servicing context when the

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[10] 78 F.R. 62999 (Oct.23, 2013)

[11] §1024.39

[12] This statement is not required by FDCPA; rather it is listed as a restriction on what communications may continue after receipt of a valid cease and desist.

lien is extinguished or liquidated. This would make clear that every borrower receives the same level of protection afforded by the Servicing Rules and would eliminate redundancies and inconsistencies created by the overlaying of FDCPA requirements onto the Servicing Rules' protections.

2. Bankruptcy: MBA urges the CFPB not to require early intervention for borrowers regardless of the bankruptcy chapter. The Bankruptcy Code offers significant protections for borrowers including strict restrictions on communications from creditors. The CFPB should not issue conflicting rules on communications that would expose servicers to significant risk of possible lawsuits.

Should the CFPB enact the rules as proposed, the CFPB should provide additional guidance and examples for borrowers under different bankruptcy chapters. The CFPB should also provide a longer implementation period as most servicers' system do not track borrowers by bankruptcy chapter. Significant systems changes would be required to permit tracking of not only borrower by bankruptcy chapter, but also co-borrowers and successors in interest by borrower bankruptcy chapter.

3. Servicing Transfers and Successors in Interest: The CFPB should distinguish situations in which a borrower is still alive and obligated under the note and should not require servicers to provide an early intervention notice to successors in interest in such situations.

VI. LOSS MITIGATION

MBA greatly appreciates the CFPB's responsiveness to industry requests for additional clarity regarding the reasonable date by which a borrower should complete a loss mitigation application and clarifications to the timelines for when a servicer must review and acknowledge a borrower's loss mitigation application when no foreclosure sale has been scheduled as of the date the loss mitigation application is received.

MBA supports the proposals to require servicers to provide prompt written notice once they receive a complete loss mitigation application and permit a servicer to stop collecting documents and information pertaining to a particular loss mitigation option after receiving information confirming that the borrower is ineligible for that option. This alleviates unnecessary burdens on borrowers while still requiring servicers to continue their efforts to obtain documents and information from the borrower that pertain to all other available loss mitigation options.

MBA also supports the expansion of the exception to the 120-day prohibition on foreclosure referral for servicers that are joining a foreclosure of a senior lien holder. MBA reiterates our previous suggestion that CFPB consider an additional exception to include vacant and abandoned properties.

As a threshold matter, it is not clear the property that has been deemed vacant or abandoned by the relevant state legal process would be considered a borrower's principal residence under §1024.30(c)(2). Since it is not the principal residence, §1024.41(f) should not apply. There are also sound policy rationales for implementing this change, as vacant and abandoned properties are often the source of blight and crime, in addition to providing a drag on neighborhood property values. State legislatures have recognized the damage to communities caused by vacant and abandoned properties and are beginning to work to create expedited foreclosure processes for these properties. MBA urges CFPB to exempt vacant and abandoned properties, determined in accordance with state law, from the 120-day foreclosure prohibition.

MBA further recommends that the CFPB provide an exception for situations in which the borrower has been evaluated and determined not eligible for a loss mitigation option in compliance with §1024.41 or a borrower has rejected an offer for a loss mitigation option prior to the 120th day of delinquency. Such an exception will protect consumers from entering foreclosure before a full evaluation and review of loss mitigation option but will not require a borrower to continue to incur fees and costs due to an unnecessary prolonged process.

A. Required Loss Mitigation Application Information Not In Borrowers' Control

Under the proposed rules, servicers would be required to promptly notify borrowers of any delay in receiving information from a third party and would be prohibited from denying a borrower's complete application solely because the servicer has not received information not in the borrower's control.

MBA Comments:

The source of third party delays can vary. Servicers can experience delays in receiving title reports, appraisal and Broker Price Opinion results, and investor approval. Housing counselors and mediators can sometimes also contribute to delays in receiving information.

In light of this, MBA understands the need to inform borrowers of a delay, but is concerned with the content of such notice. The "date servicer requested the information" may be difficult to determine as this information is not systematically captured in servicing systems. To ensure ease of producing this form, MBA urges the CFPB to develop a generic notice which communicates a delay, so that servicers need not incur unnecessary programming and processing costs, but which communicates a delay.

This proposal may also cause conflicts with current Equal Credit Opportunity Act (ECOA or Regulation B) requirements. Proposed §1024.41(c)(4)(ii)(A) would mandate that a servicer not deny a complete loss mitigation application solely because the servicer has not received documents or information not in the borrower's control. However, loss mitigation efforts[13] subject to ECOA require a creditor to notify an applicant of action

[13] A loan in imminent default (up to one month delinquent).

taken — approval of, counteroffer to, or adverse action — *within* 30 days after receiving a *completed* application.[14] To resolve this confusion, we request that the Bureau clarify that open determinations pending receipt of third-party information will not violate Regulation B when it applies. In the alternative, we suggest that servicers may deny these complete loss mitigation applications within 30 days of receipt provided that the servicer promptly offers any additional loss mitigation options that may become available upon receipt of third-party information during the appeal period following the denial.

MBA also urges CFPB to clarify its rules on what constitutes a complete loss mitigation application so as to not unduly burden borrowers of government-insured loans who apply for assistance. The proposed commentary reiterates the CFPB's preference for a single application process to evaluate a borrower for all available loss mitigation options, but the commentary does not provide any additional guidance on the definition of a complete loss mitigation application. While the proposed commentary states that a servicer may stop collecting documents from a borrower when it determines that the borrower is ineligible for a particular option, it also provides that a servicer *may not* stop collecting documents simply because a borrower expresses an interest in other options.

This commentary is particularly confusing when applied to the FHA loss mitigation waterfall because, to be eligible for available non-retention options, borrowers must express an interest in those options. Requiring all borrowers who apply for loss mitigation assistance to submit the most onerous set of application materials will create an unnecessary burden for the vast majority of borrowers seeking assistance and will have the unintended consequence of causing borrowers to disengage in the process. CFPB must clarify its rules so as not to interfere with the well-established FHA and VA loss mitigation programs.[15]

B. Payment Forbearance on Incomplete Application

Under the proposed rules, a servicer would be permitted to offer a short-term repayment plan based upon an evaluation of an incomplete application. A short-term repayment plan would be required to be in writing and allows for the repayment of no more than three months of payment due over a period lasting no longer than six months.

<u>MBA Comments</u>:

Under the current rules, a short-term payment forbearance is defined as a period of no more than six months, regardless of the amount of time a servicer allows the borrower

[14] Under 12 CFR §1002.9(a)(1)(i).

[15] MBA also believes this proposal is inconsistent with the unofficial oral guidance given on numerous occasions by CFPB staff that allows investors to establish loss mitigation programs that bypass home retention options if the borrower indicates a desire to vacate the home. Under the oral guidance, the servicer must identify in the denial letter that a modification was not granted because the borrower requested liquidation. While collecting documents and denying a modification are two different requirements and thus can coexist, it seems to add a burden for borrowers to gather unnecessary documents that could delay submitting a complete loss mitigation application.

to make up the missing payments.[16] If borrowers have unlimited time to repay a forbearance, we believe it is necessary that borrowers have the same amount of time to repay under repayment plan, otherwise the rules for forbearance and repayments conflict.

MBA suggests that the start of such a plan should not be required in writing but could occur following a conversation between the borrower and servicer. A written plan would be required eventually to memorialize the agreement but could list a start date before the written communication was generated. This will allow the borrower to get more immediate relief and not go further into delinquency waiting for the written communication subsequent to the oral discussion. It will also eliminate the confusion and ambiguity that would attach to requiring a written document to be the starting point as it is not currently clear from the proposal if would become effective following sending, receipt or acknowledgement of receipt.

C. Mandatory Dismissal of Scheduled Foreclosure Sale

Servicers would be required to take affirmative steps to delay a foreclosure sale—even those conducted by third parties upon receipt of a complete loss mitigation application. A servicer that has not taken all reasonable affirmative steps to delay the sale would be required to dismiss the action if necessary.

MBA Comments:

MBA believes the current rule is sufficient as it requires servicers to take reasonable efforts to stop a sale under certain circumstances. Servicers should take steps to postpone a sale if practicable and should have reasonable policies and procedures in place to do so; however the CFPB should not require a servicer to dismiss the foreclosure action or sale in all cases. Dismissal of a foreclosure action can, in some instances, result in a statute of limitations bar on enforcing the foreclosure in the future.

D. Duplicative Loss Mitigation Applications

Under the proposed rules, servicers would be required to comply with the loss mitigation requirements under §1024.41 throughout the life of the loan for borrowers who become current after a delinquency.

MBA Comments:

While MBA could support the ability to receive loss mitigation more than once over the life of the loan, this principle should be limited to prevent abuse and reduce evaluation burden. As written this regulation would require a servicer to evaluate a borrower for loss mitigation three months after a loan modification. Such a borrower is unlikely to qualify and requiring such review will only serve to unnecessarily delay the process or provide opportunities for abuse. MBA urges the CFPB to allow servicers and investors

[16] Comment 41(c)(2)(iii)-1.

to set reasonable time requirements before a borrower is eligible to apply again for loss mitigation assistance.[17] In the alternative, MBA suggests that certain protections—like the bar to proceeding to foreclosure—should not apply if a borrower applies for loss mitigation soon after a prior application.

Some smaller institutions that hold their loans on portfolio have reported that this requirement may require them to change their loss mitigation process. Currently these servicers will often forgive significant late fees or other charges incurred throughout the delinquency in order to maintain the customer relationship and assist the borrower in modifying their loan with the understanding that such modification and forgiveness is only going to be available once over the life of the loan. Should these institutions be required to re-evaluate the borrower multiple times, these servicers would be less able to forgive late fees or other fees.

E. Servicing Transfers and Loss Mitigation

Under the proposed rules, a transferee servicer must comply with the loss mitigation requirements within the same timeframes that were applicable to the transferor servicer. The proposed exceptions include a five-day extension of time for a transferee servicer to provide the required written acknowledgment, and a provision ensuring that a transferee servicer that acquires servicing through an involuntary transfer has at least 15 days after the transfer date to evaluate a borrower's pending complete loss mitigation application.

The proposed rules would also require a transferee servicer to evaluate a borrower's appeal that is pending as of the transfer date, if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal. If the transferee servicer is unable to evaluate an appeal, it must treat the appeal as a complete loss mitigation application and evaluate the borrower for all loss mitigation options available to the borrower from the transferee servicer. In addition, if a transferor servicer offered the borrower a loss mitigation option and the borrower's time to accept or reject the offer had not expired as of the transfer date, a transferee servicer must allow the borrower to accept or reject the offer.

MBA Comments:

Concerns over servicing transfers have prompted increased regulatory requirements and scrutiny over the past several years.[18] Servicers have implemented numerous

[17] Such a change would be consistent with other consumer protection regulations. For example, in bankruptcy law, the nature of the automatic bankruptcy stay changes based on the number of times a borrower has previously filed for bankruptcy in the last year. In the same vein, the Uniform Retail Credit Classification and Account Management Policy states that open-ended accounts should not be re-aged more than once within any 12-month period and no more than twice in any five-year period.

[18] MBA notes with concern that rules that make it impossible to transfer any loan in loss mitigation will unduly impact veterans who participate in VA programs and first-time and lower and middle class homebuyers that use FHA's lending programs. VA and FHA loans are securitized into Ginnie Mae pools that cannot be broken upon transfer. So while a servicer may elect to not transfer conventional loans that

process changes in response, particularly with respect to delinquent borrowers. Many servicers stagger the sale date and transfer date to ensure accurate and timely onboarding of transferred loans.

MBA shares the CFPB's concern for the protection of borrowers with pending loss mitigation applications and in-flight modifications during a servicing transfer. In order to ensure that such borrowers receive appropriate loss mitigation assistance, a transferee servicer must be afforded enough time to thoroughly evaluate the borrower's application.

MBA appreciates the CFPB's proposed extension of the five day timeframe to send the written acknowledgment under §1024.41(b)(2)(i)(B) and the extension of time for transferee servicers that acquire servicing through an involuntary transfer to review pending complete applications. We urge the CFPB to extend a transferee servicer's time to review pending complete applications regardless of whether the transfer was involuntary in order to ensure borrowers receive the full protections of §1024.41.

The transferee servicer is required to perform an appropriate review by the investor and the proposed rules would not permit a sufficient level of due diligence, but instead force a transferee servicer to pick up where the transferor servicer left off. For example, if a borrower's complete application had been under review by the transferor servicer for 25 days prior to the servicing transfer, the transferee servicer would be required to complete the review in five days. A borrower may also apply for loss mitigation in the midst of a servicing transfer, leading to a confusion and delay regarding response. Requiring such hasty review could lead to undue confusion or borrowers being denied.

MBA urges the CFPB to permit a transferee servicer to fully evaluate complete loss mitigation applications received from a transferor servicer under the applicable timeframes of §1024.41 beginning on the date of transfer. This would ensure borrowers receive a thorough review and evaluation while still receiving the protections against dual tracking and the protections currently in place for 60 days following a servicing transfer. It would also be consistent with the CFPB's proposal that transferee servicers who are unable to evaluate a borrower's appeal must treat the appeal as a complete application and perform a full review.

VII. PROMPT PAYMENT CREDITING

MBA appreciates the proposed clarification that a payment made under a temporary loss mitigation program, if insufficient to cover principal, interest and escrow, may be treated as a partial payment.

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are in loss mitigation, that option is not available with Ginnie Mae loans. A deep and liquid market for servicing benefits all consumers—and relies on the ability to sell or transfer servicing to be successful. Regulatory obstacles to transferring VA or FHA servicing could have negative impacts that would be felt down the value chain.

VIII. PERIODIC STATEMENTS

MBA strongly supports CFPB's proposed exemption from the periodic statement requirements for charged-off loans and greatly appreciates the CFPB's responsiveness to industry concerns regarding certain periodic statement requirements. MBA is generally supportive of CFPB's proposals and offers the following comments on specific provisions.

A. Temporary and Permanent Loss Mitigation Programs

Under the proposed rule, if the borrower has agreed to a temporary loss mitigation program, a servicer may either identify the amount due under the loan contract or the payment due under the temporary loss mitigation program in the "amount due" section of the periodic statement. If a servicer identifies the amount due under the temporary loss mitigation program, the explanation of amount due should include the amount due under both, as well as an explanation that the amount due is disclosed as a different amount because of the temporary loss mitigation program.

MBA Comments:

MBA considers it very important that the CFPB provided the appropriate clarity regarding how to reflect permanently modified loans and temporary loss mitigation plans on periodic statements. We strongly support the proposal to give servicers flexibility in determining what payment to include in the amount due section.

B. Accelerated Loans

Under the proposal, if the balance of a loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due disclosed on the periodic statement should identify only the lesser amount that will be accepted to reinstate the loan, not the entire accelerated balance. However, the explanation of the amount due must include both the reinstatement amount and the accelerated amount. The statement must also include an explanation (on front page, separate page, or separate letter) that the reinstatement amount will be accepted to reinstate the loan.

MBA Comments:

The CFPB appears to be requiring servicers to provide a payoff-type statement for accelerated loans although the proposed rule does not define "reinstatement" or "acceleration" amounts. However, there is not a standard industry definition of "reinstatement" as reinstatement procedures are often set by state statute.

The proposed requirements would introduce a serious implementation challenge as significant systems changes and new data feeds would need to be added to the periodic statement and incorporated into servicing systems. It would also be extremely difficult to build investor requirements for pay-offs into a billing system. For example, providing per diem interest up to the next statement would be problematic. The calculation is so fluid and complex that currently many servicers calculate reinstatement amounts manually due to the number of fields that are needed to calculate it.

In a standard mortgage loan, the periodic billing process is designed to bill according to the amortization schedule. If the billing statement must include an accelerated amount, it is unclear how the amount would be accurately reflected. Providing per diem interest as of a particular date (i.e., production date) would require new programming to perform per diem calculations, to bring in all investors rules associated with the calculation of interest (which may not be per diem), and to establish new controls/security. This is not a simple matter and indeed is the reason why the payoff functions are separate and apart from billing systems and cannot be leveraged to produce the periodic statement.

If the accelerated interest can be calculated as of the next bill due date (e.g., next installment), this figure will still under-represent fees that become due between the production date and bill due date, making the acceleration figure inaccurate. Under-representing the acceleration amount will place servicers in an adversarial position with borrowers when servicers try to collect undisclosed fees despite disclaimers as to the accuracy of the information.

Given the lack of usefulness and accuracy concerns with producing an accelerated balance, MBA believes that servicers should required to only include the reinstatement amount (not the accelerated amount) as defined in accordance with the contract and investor/insurer rules and be permitted include disclaimers to explain the "reinstatement" amount.

MBA is concerned that reference to a "reinstatement amount" on the periodic statement could cause borrower confusion as borrowers may assume that payment of that amount would bring their loan account current. Statements would need to include a clear disclaimer that the reinstatement amount is not the payoff amount.

MBA believes a preferable approach would be to provide information on what amount is needed to bring the loan current but not refer to this amount as the "reinstatement" amount. Servicers could include a statement such as "*You may qualify for reinstatement*…" and encourage the borrower to contact the servicer to discuss further.

C. Periodic Statements for Borrowers in Bankruptcy

1. When Periodic Statements Would Be Required.

The proposed rules would limit the exemption from periodic statement requirements to consumers in bankruptcy that are surrendering the property or avoiding the lien securing the loan as well as consumers who have opted out.

Specifically, the proposed rule would not require periodic statements or coupon books if both prongs of a two-prong test are met:

- The debtor is in bankruptcy,
- The debtor has discharged personal liability for loan through bankruptcy, or
- The borrower is a primary obligor for which another primary obligor is a debtor in a Chapter 12 or 13 case

  AND one of the following:

- The consumer requests in writing that servicer cease providing statements,
- The consumer's confirmed plan of reorganization provides that the consumer will surrender the property, provides for the avoidance of the lien securing the loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearages or the maintenance of payments due under the loan,
- The court enters an order in the consumer's bankruptcy case providing for the avoidance of the lien securing the loan, lifting the automatic stay, or requiring the servicer to cease providing the statements, or
- The consumer files with the bankruptcy court a Statement of Intention identifying intent to surrender the property securing the loan.

For multiple obligors, the exemption would only apply to non-bankrupt obligor when one of primary obligors is in Chapter 12 or Chapter 13 and the non-bankrupt obligor requests that servicer cease sending statements.

MBA Comments:

As an initial comment, MBA notes that this proposal is very complex and would require a servicer to evaluate each particular consumer file for seven specific factors.[19] If one is present, the servicer then must review the file for evidence of eight possible factors.[20]

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[19] A servicer would have to determine if the borrower: (1) Is a debtor in a case under the U.S. Bankruptcy Code; (2) Is a primary obligor on a mortgage loan for which another primary obligor is a debtor in a Chapter 12 case under the U.S. Bankruptcy Code; (3) Is a primary obligor on a mortgage loan for which another primary obligor is a debtor in a Chapter 13 case under the U.S. Bankruptcy Code; (4) Has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727; (5) Has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 1141; (6) Has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 1228; or (7) Has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 1328.

[20] If one of the factors in footnote 22 is met, the servicer would then be required to determine if: (1) The consumer requests in writing that the servicer cease providing periodic statements or coupon books; (2) The consumer's confirmed plan of reorganization provides that the consumer will surrender the dwelling securing the mortgage loan; (3) The consumer's confirmed plan of reorganization provides for the avoidance of the lien securing the mortgage loan; (4) The consumer's confirmed plan of reorganization otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan; (5) A court enters an order in the consumer's bankruptcy case providing for the avoidance of the lien securing the mortgage loan; (6) A court enters an order in the consumer's bankruptcy case lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the dwelling securing the mortgage loan; (7) A court enters an order in the consumer's bankruptcy case requiring the servicer to cease providing periodic statements or coupon books; or (8) The consumer files with the court overseeing the consumer's bankruptcy case a Statement of Intention pursuant to 11 U.S.C.

This process is likely to require specialized staff and expensive review. MBA respectfully requests that the Bureau due a thorough analysis of the burdens imposed by requiring this review (possibly by outside counsel) against the consumer protections afforded.

Opt-in: The CFPB seeks comment on whether consumers in bankruptcy should be required to opt-in to receive statements and, if so, whether documents filed with the bankruptcy court, such as a Statement of Intention or plan of reorganization, are sufficient to qualify as a request to receive statements. Whether a statement or other communication violates the automatic stay or discharge injunction is determined by the Bankruptcy Code. However, obtaining a written request to receive statements from the debtor or debtor's counsel provides more protection to defend against claims of a violation of stay than the proposal to send statements in almost all bankruptcy cases.

Due to the potential conflicts between bankruptcy law and the servicing rules, MBA strongly encourages the CFPB to require consumers to opt-in to receive statements and that such opt-in be made in writing, separate from bankruptcy filings. Servicers should be permitted to direct such requests be sent either to the designated address (if established) for requests for information or the address provided in the Proof of Claim.

Surrendering the property: The proposed rule exempts servicers from the periodic statement requirements upon a *filing* of an intent to surrender by a debtor in Chapter 7 but does not exempt a servicer of a loan with a debtor under Chapter 13 until the plan of reorganization is *confirmed*. There is apparent consumer protection rationale to distinguish between debtors under different bankruptcy chapters who will not be retaining the property. We suggest the CFPB revise the language in proposed Section 1026.41(e)(5)(B) to apply the exemption upon a consumer's *most recent filed, amended, modified or confirmed* plan of reorganization.

Timeline for Resuming Statements is Insufficient: Under the proposed rules, servicers would be required to resume sending periodic statements "within a reasonably prompt time after the next payment due date that follows the earliest of the following outcomes in either the consumer's or the joint obligor's bankruptcy case: the case is dismissed or closed, the consumer reaffirms the loan, or the consumer receives a discharge." The CFPB indicates that four days after the next payment due date, or within four days of the close of any applicable courtesy period, generally would be considered reasonably prompt.

MBA respectfully requests that the CFPB revise the timeframe in which a servicer must resume sending statements to a reasonably prompt period of time *after the second payment due date* that follows the earliest of the specified outcomes. Four days after the next payment due date is not a reasonable period of time for a servicer to resume periodic statements given the adjustments that may be required to switch to or from regular or modified statements.

521(a).

Statements to Trustees: The CFPB also seeks comment on whether servicers should be required to provide statements to Chapter 13 Trustees. MBA strongly opposes requiring servicers to send periodic statements to Chapter 13 trustees. Trustees do not need copies of a debtor's periodic statement in order to perform their statutory duties and requiring servicers to provide statements to trustees would require significant and costly systems changes. Trustees have other alternatives to access information, including requesting a copy of the statement from the debtor.

2. Modified Statements for Borrowers in Bankruptcy

The Bureau is proposing two types of modifications for periodic statements provided to consumers in bankruptcy. For debtors under any chapter of the Bankruptcy Code, and consumers who have discharged personal liability for loan through bankruptcy, periodic statements could omit:

- The amount of any late fee and the date on which that fee might be imposed;
- The date on which the borrower became delinquent;
- The possible risks of not curing a delinquency; and
- Whether the servicer has made the first notice of filing for foreclosure.

The modified statement would not be required to show the amount due more prominently than other disclosures but it would need to identify on the first page the consumer's status as a debtor in bankruptcy or that the loan is discharged and would need to indicate that the statement is for informational purposes only.

For consumers who are debtors in a case under Chapter 12 or 13 of the Bankruptcy Code, in addition to the above modifications statements servicers may omit the remainder of the delinquency information normally required. The proposed rules also modify the amount due, explanation of amount due, the past payment breakdown and transaction activity.

Under the proposed rules, a servicer would be required to resume regular (non-modified) periodic statements or coupon books when a bankruptcy case is closed or dismissed. However, a servicer would still required to send a modified statement if the consumer has discharged personal liability for the loan. When two or more consumers are primarily liable on a loan, and an exemption from the periodic statement requirement applies to one of the consumers, a servicer is still required to send regular, non-modified statements to the other obligors. If one of the joint obligors is in bankruptcy but no exemption applies, the servicer would be required to provide modified statements to the consumer in bankruptcy but would have the option of providing either modified or non-modified statements to the other obligors.

MBA Comments:

Plan-to-Date versus Year-to-Date Presentation: Proposed §1026.41(f)(3)(vi) would require showing pre-petition payments the servicer received during the statement cycle and year-to-date. It would not require a breakdown of pre-petition payments into principal, interest, and escrow, or suspense. MBA supports not requiring a breakdown of pre-petition payments because it would confuse the important information, which is how the consumer is progressing at reducing the pre-petition arrearage. MBA also suggests that pre-petition information reflect the "total pre-petition claim amount," "total pre-petition amount paid to date," and "pre-petition remaining balance" as of the date of the statement, and eliminate the "pre-petition amount paid last month" and "year to date" payments.

Clarification of "Post-Petition" on Statement: As proposed, Chapter 12 and 13 statements would include a box entitled "Post-Petition Payments Breakdown." MBA believes that this grouping of information should retain the title of "Past Payment Breakdown" as stated in the proposed regulatory text of §1026.41(f)(3)(iv). We also believe it is critical to allow servicers to reflect all "payments received" rather than just "post-petition payments received" in the Past Payment Breakdown. Servicers need to show how cash received is applied according to the contract. The titling of the box as Post-Petition Payment has created considerable confusion for the industry as it implies a servicer could not show pre-petition payments received or how that "cash" was applied according to the contract. Including some, but not other payments, will leave gaps in cash application and would not be feasible or practical from a system perspective. It will also likely create considerable confusion for the borrower and impart incorrect information.

IX. SMALL SERVICER

MBA supports the proposed rules to exclude certain seller-financed transactions from being counted toward the 5,000 loan limit.

Conclusion

MBA appreciates the opportunity to offer these comments on the Proposal. In light of the recent regulatory burden imposed by the changes required by the Servicing Rule and the difficulties raised by some aspects of this proposal, MBA respectfully requests an implementation period of a year for most proposed provisions and 18 months for the periodic statement and successor in interest provisions so that stakeholders can build, test and implement the processes and procedures necessary to comply without disruption or consumer misunderstanding.

Please feel free to reach out to Justin Wiseman, Director of Loan Administration Policy, at (202) 557-2854 or JWiseman@mba.org or Sara Singhas, Policy Advisor, at (202) 557-2826 or SSinghas@mba.org with any questions you might have regarding these comments.

Sincerely,

Stephen A. O'Connor
Senior Vice President of Public Policy & Industry Relations