MORTGAGE BANKERS ASSOCIATION

July 10th, 2017

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

Re: "Real Estate Settlement Procedures Act Servicing Rule Assessment", Docket ID: CFPB 2017-0012

The Mortgage Bankers Association[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) planned assessment of the Real Estate Settlement Procedures Act (RESPA) portion of the 2013 Mortgage Servicing Rule ("the rule"). MBA understands that the CFPB is under statutory obligation to complete reviews of any "significant rule or order"[2] and concurs with the Bureau's judgment that the 2013 Mortgage Servicing Rule is indeed significant. The rule required mortgage servicers to spend millions of dollars and countless staff hours to come into compliance and it is appropriate to conduct an assessment of the rule, its costs and the resultant market outcomes.

As an initial matter, MBA questions the timing of the current assessment when there are still significant revisions to the rule that have yet to come into effect.[3] These amendments, which are effective on October 19, 2017 or April 19, 2018, put forth some substantial changes to the rules that are expensive to implement and introduce ongoing burdens on mortgage servicers. These changes should not be excluded from the review process and MBA suggests that any final assessment include, at a minimum, enterprise-level implementation cost data and estimates of ongoing compliance burdens. Given that the final report is not "due" until January 2019, we see no reason to omit the amendments to the rule from review and assessment.[4]

The statutory review requires that the Bureau both evaluate a rule against the "specific goals stated by the Bureau" and "the effectiveness of the rule or order in meeting the purposes and objectives" of the portion of Dodd-Frank establishing the Bureau. Thus, in addition to the

[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.mortgagebankers.org
[2] 12 USC § 5512(d) or Dodd-Frank Section 1022(d).
[3] See Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 FR 72160, October 19 2016.
[4] We also note that the significant expense and process changes necessary to implement the changes to TILA requiring periodic statement in bankruptcy warrant further review, particularly in light of the limited consumer testing that occurred before the rule.

specific RESPA objectives identified by the Bureau, the review should focus on evaluating the rule against the following objectives:

1. "consumers are provided with timely and understandable information to make responsible decisions about financial transactions;
2. consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;
3. outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;
4. Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and
5. markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[5]

The review should also evaluate the extent to which the rule has impacted the availability of mortgage credit in light of Bureau's general purpose to "ensure that all consumers have access to markets for consumer financial products."[6] With these broader objectives in mind, MBA offers the following comments on (1) the feasibility and effectiveness of the assessment plan and factual information that might be useful, (2) recommendations to improve the assessment plan and sources of data and (3) recommendations for modifying, expanding or eliminating the rule.

I. Comments on the Assessment Plan As Proposed

a. *Data requests should be reasonable and institutions that choose to provide such data should be masked or anonymized.*

The statutory requirement is to conduct this evaluation based on "available" evidence and data that the Bureau might "reasonably" collect.[7] The CFPB should thus be mindful of the requests it makes upon its supervised depository entities over $10 billion or supervised non-depositories to ensure that any requests are neither overly broad nor burdensome to comply with. As a general matter, loan-level data requests are the most burdensome and enterprise-level reports the least. As such, this process should only involve loan-level data requests where absolutely necessary and should utilize sampling techniques whenever such data is requested. To this end, MBA asks that the CFPB publicly discloses the "de-identified loan-level data" it intends to request so that it can get feedback on what it intends to measure, whether it is necessary or if there are less burdensome alternative sources of data.

Ensuring the confidentiality of any data provided as part of this assessment should be of paramount concern to the Bureau. The Bureau has broad authority to request information but is obligated to ensure that confidential and proprietary commercial information is protected from public disclosure.[8] Any company or loan level information requested by the CFPB should be covered by supervisory privilege or other relevant, well-established legal protections. One protection CFPB must ensure applies is the FOIA exemption for "examination, operating, or

[5] 12 USC §5511 (b)
[6] 12 USC §5511 (a)
[7] 12 USC §5512(d)(1)
[8] 12 USC §5512(c)(8). We also note that property rights in proprietary data are constitutionally protected (see *Ruckelshaus v Monsanto Co*., 467 US 986 (1984)).

condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[9]

The Bureau should also protect the security of the data by masking the identities of the institutions providing it and combining the data set to safeguard anonymity. The information the Bureau will collect is going to be sensitive to those providing it or possibly to consumers if loan-level data is sought. The Bureau could eliminate any risks by combining the data provided by businesses without any entity identifier beyond broad classifications based on size (perhaps based on total serviced UPB) and/or business model. As this data is intended to evaluate the effectiveness of the rule rather than examine any one particular institution, such masking will not have a meaningful effect on the assessment.

The Bureau should explore having an independent third party collect the data and transmit it without identifying information. MBA is willing to assist in the collection and provision of the data without identifying the institution if that is preferable for the supervised entities and to ensure anonymity.

b. This information should not be shared for purposes beyond the stated rationale of informing an assessment of the rule.

As discussed in the section above, MBA believes the data should be anonymized at the entity level to both protect the servicers that provide it and enable the candid exchange of views that such an assessment requires. A key requirement to ensure the thoughtful discussion necessary to achieve the statutory purpose is a commitment by the Bureau that any information provided will not be shared with the Bureau's supervisory or enforcement staff or other such regulators. Entities will be hesitant to provide data if they believe that this is a "back-door" examination, and this would inhibit the free exchange of views necessary for a qualitative assessment of the rule.

c. CFPB should accept voluntary participation from depositories of assets of less than 10 billion

CFPB rules protect institutions that provide "any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the CFPB shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than the CFPB."[10] As CFPB supervisory jurisdiction applies to depository mortgage servicers with assets over $10 billion and non-depository mortgage servicers, these entities would be able to claim supervisory or "bank examiner" privilege over information that they provide to CFPB. However, a depository under $10 billion may not be able to claim such privilege since the CFPB does not have supervisory or examination authority over them. Given this risk, the CFPB should only solicit voluntary participation from these entities.

II. Recommendations to Improve the Assessment Plan

a. *The evaluation must assess implementation costs and the burden of compliance with these rules.*

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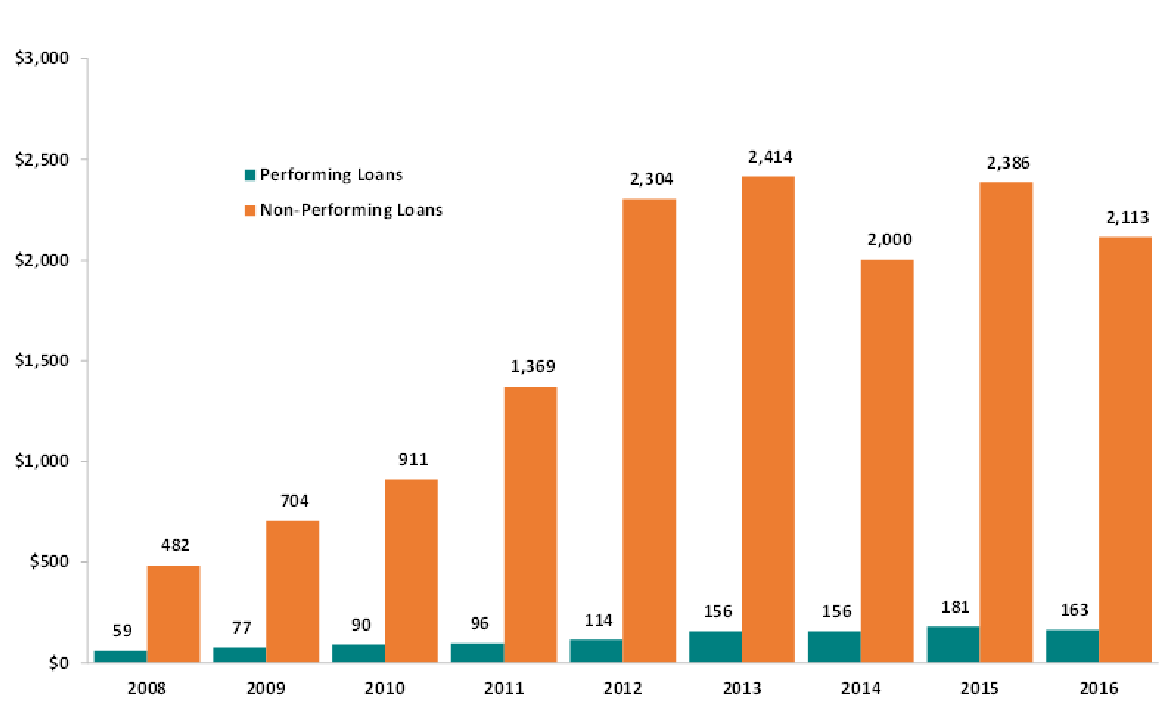
[9] See 5 USC §552(b)(8).
[10] 12 CFR 1070.48

In order to fulfill its statutory mandate — outlined above — the Bureau's assessment of the rule should take into account both the implementation outlays and on-going costs the rule requires and the effect that the rule may have had on access to consumer credit. Such an inquiry should be given equal weight and attention as an appropriate focus on consumer outcomes given the enumerated objectives of the Bureau in Dodd-Frank and its dual mandate focusing on both market access and market fairness.

MBA has gathered data over time on the costs of servicing loans that suggests that this rule contributed to the significant increase in the cost of servicing, particularly with regard to non-performing loans. The following chart from MBA's 2017 Servicing Operations Study and Forum (SOSF) illustrates the dramatic increase in servicing costs per loan:



Clearly these increasing costs are not solely attributable to the rule, but the rule certainly contributed to the rising cost of servicing. These rising costs alter the economics of servicing loans and the look back should focus on an accounting of how it is has done so. Additionally, given the extreme rise in costs of servicing defaulted loans, it is logical that some lenders will have changed their product offerings or imposed credit overlays to attempt to limit their exposure to these costs.

The Bureau could evaluate the impact of the rule on both servicing costs and access to credit by, among other data sources, attempting to collect:

- Enterprise-level cost of implementation data for the rule and the ongoing costs of compliance.
- Qualitative interviews of a diverse group of servicers that attempt to capture how the rule, rising servicing costs and the attendant fear of liability has changed their business strategy. Such topics might include:
    - Whether the regulatory requirements influence the decision to retain servicing.

- How servicers view the increasing cost to service and the extent to which it influences origination or acquisition policies.
- How servicers design their internal and vendor oversight procedures in light of the rule.
- An analysis of the possible effect of the Bureau's current guidance procedures, approach to enforcement actions and regulatory or supervisory process on the servicing market.

- A review of the extensive literature on access to credit following the Dodd-Frank rules to attempt to identify the extent to which the high cost of servicing delinquent loans impacts access to credit.

The assessment process should also evaluate the sufficiency of the initial burden determinations that the Bureau made when proposing the rule. Ex post facto review of such assessments to determine their accuracy and identify possibly inaccurate assumptions or errors in the model that was used will be crucial for future Bureau rulemakings. We note the CFPB's initial determination was that the rule would require approximately $20.9 million in ongoing burden and an increase in the cost of servicing distressed loans of *at least* $90 million. Our belief is that these estimates of ongoing burden are significantly lower than the actual figures, even if the figure for distressed loans is an estimated cost floor.

b. *The final evaluation should be rigorous in how it evaluates "cause" and "effect" stemming from the rule*.

The report should not count outcomes that would have occurred or were occurring prior to the passage of the rule in order to fully understand both the impact of the rule and its associated outcomes. This includes actions that were undertaken due to the national servicing settlement or contemporaneous consent decrees that dictated servicing practices or processes that may be similar to requirements that were codified in the rule.[11] While these standards and orders may have influenced the direction of the final CFPB RESPA servicing rule, the outcomes that occurred are not attributable to the rule and should not be counted. A simple way to ensure that these outcomes are not counted is to not include consumer outcome data for the period in which an institution was subject to servicing requirements that predated the finalization of the rule.

The assessment plan will seek to review "consumer outcomes that the 2013 RESPA Servicing Rule sought to affect, including, for example, fees and charges assessed and paid, incidence and severity of delinquency, <u>how delinquency is resolved</u>, and time to resolution of delinquency." The report should not conflate completed modifications or other resolutions of delinquency with consumer access to modifications or disposition options. The CFPB rule wisely does not dictate outcomes in loss mitigation, leaving those programmatic decisions to investors on a Bureau-specified schedule. Put another way, the rule sets the requirements by which a servicer — on behalf of the investor — must inform a borrower of their loss mitigation

[11] The assessment plan discusses this challenge in discussion of the difficulties of creating a baseline and suggests that the rule would be additive to these requirements. "Even if one can observe a clear association between activities that the rule requires and consumer outcomes, the Bureau recognizes that some of those activities might also be required by consent orders, State law, or private contracts. In these cases, the impacts one observes may reflect these other requirements ***in addition*** to those of the rule." Viewing these requirements as additive to the rule may not be accurate in light of the timing. Consent orders and other agreements that pre-date the rule cannot reasonably be said to be in response to or supplementing rules or processes that did not exist at the time of agreement.

options and the timetable by which they must complete their review of the borrower's application. Thus, the review of the rule should focus on the impact on borrower access to modifications, perhaps by counting loss mitigation applications, not the number or volume of completed modifications.

c. *The CFPB's baseline will likely be determinative to the review and should be shared publicly for input.*

The proposed assessment plan notes that in "conducting the assessment, the Bureau will seek to compare servicer and consumer activities and outcomes to a baseline that would exist if the 2013 RESPA Servicing Rule's requirements were not in effect." The assessment plan rightly acknowledges the difficulties of creating such a baseline given the lack of an unregulated "control group." Creation of this baseline is likely to be one of the most significant decisions the Bureau will undertake during this review. How this "control" environment is defined and the parameters or assumptions that are made will essentially determine the outcome of the entire review.

We encourage CFPB to use an unaffiliated third party to determine the appropriate baseline in order to ensure a more robust assessment. Such third party involvement would help ensure that the baseline is appropriately designed and not conclusory at the outset of the review. It would also minimize any possible suggestion of a conflict of interest.

As with our request above regarding de-identified loan data, at a minimum we strongly encourage CFPB to publically disclose the baseline and accept comments for review. In light of the importance of a reasonable control baseline to the outcome of the entire assessment, the determination of how to create this metric would benefit from public engagement to determine the appropriate baseline. The initial phase of the overall assessment process should focus on how to construct this baseline by bringing together industry, regulators, consumer advocates and other knowledgeable experts. MBA is happy to help convene such discussions or work with our members to assist in development of the baseline.

III. Recommendations for modifying, expanding or eliminating the 2013 RESPA Servicing Rule.

MBA appreciates the Bureau opening the rule up for suggestion and comment in this assessment and notes that the Bureau has been also evaluating the rule, as demonstrated by its pending amendments to the rule that have yet to take effect. Constant evaluation of the rule, in addition to this statutory milestone, is helpful and necessary as servicing technology, modes of communication and borrower preferences change and evolve. This Dodd-Frank milestone is significant, but it should not be the end of the conversation on how to amend or otherwise improve the rule.

We offer the following suggestions for improvement or modification to the rule in the spirit of improving or maintaining borrower safeguards while lessening burden or cost on the industry. The Bureau's dual mandate encompassing both market access and regulation demands such a lens.

a. *The rule should be preemptive to prevent duplication and drive alignment towards comprehensive national standards.*

Overlapping and duplicative regulation is a serious driver of increasing cost and complexity for mortgage servicers. This lack of unified national servicing standards for federally related mortgage loans should be addressed through a multi-agency process. The U.S. Treasury has recognized this issue in its recent report on reducing regulatory burden and creating economic opportunity, calling on the CFPB to work with "prudential regulators and state regulators to improve alignment where possible in both regulation and examinations" in mortgage servicing.[12] MBA strongly supports this recommendation.

The standards embodied in the CFPB rule are extremely thorough and required extensive re-tooling and training. Adding layers of state requirements only increases cost and complexity, with little added benefits for borrowers. This is because the Bureau standards, following Congressional legislation, were intended to be comprehensive and provide all mortgage borrowers with defined processes and clear avenues for redress, regardless of their state of residence. In light of this, the official interpretation to 12 CFR 1024.5(c)(1) should be withdrawn and a new interpretation should be promulgated to make clear that the CFPB's RESPA servicing rules constitute preemption of more restrictive state laws. This is appropriate given the breadth of the coverage of the rules, their possibility for amendment with nationwide effect when necessary and the extensive effort undertaken by industry to come into compliance.[13]

One illustrative example from California demonstrates how overlapping standards can create confusion and add cost. The California Homeowner's Bill of Rights requires servicers to pause foreclosure at any point before the sale when there is an application for loss mitigation, even if the application for loss mitigation package is potentially delivered on the courthouse steps.[14] This contrasts with the CFPB's servicing rule, which gives a borrower until 37 days before a scheduled sale to submit a complete application. In doing so, the Bureau noted:

> The Bureau also is persuaded that it is necessary, and appropriate, to implement protections for consumers that apply for loss mitigation options closer in time to a foreclosure sale than 90 days. At the same time, the Bureau is cognizant that if applications received at the last moment were allowed to unduly delay a foreclosure from proceeding, there is a risk that the application process could be used tactically to stall foreclosure. Given that foreclosure timelines are already very long in many jurisdictions; given that the Bureau is implementing protections to mandate early communication with borrowers regarding loss mitigation options; and given that the Bureau is prohibiting servicers from proceeding to foreclosure unless a borrower is more than 120 days

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[12] U.S. Department of Treasury. *A Financial System That Creates Economic Opportunities, Banks and Credit Unions*, at p. 137. Issued June 2017. Available at: https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf

[13] There is a strong argument that preemption is appropriate here given the inclusion of numerous mortgage servicing provisions in Dodd-Frank, together with creation of a federal agency to add to and enforce them as well as RESPA's jurisdiction over *federally related* mortgage loans. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.")(internal citations omitted).

[14] See Cal. Civ.Code § 2923.6(c) (If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending.)

delinquent to ensure that borrowers have the opportunity to apply for loss mitigation options early in the delinquency timeline; **the Bureau does not believe it is appropriate to permit applications provided shortly before a foreclosure sale to delay the foreclosure**.[15]

In addition to this, California also provides 30 days for a borrower to appeal a loss mitigation decision as opposed to 14 days provided under the CFPB's rule, adding more time and delay to a process already well-covered by the federal rule. It is likely that other state laws that might promulgate requirements beyond the CFPB rule are going to be similar to this example, adding cost, complexity and delay with little additional consumer protections.[16] The CFPB devoted significant time and resources to develop its servicing rules and has the power to amend them if necessary. These comprehensive rules should be sufficient to regulate the consumer-facing aspects of mortgage servicing.

b. *The rule should loosen servicing transfer successor liability to assist with market liquidity and prevent consumers from being "stuck" with a servicer.*

The CFPB's rules and guidance have made clear that successor servicers are responsible for the entirety of the servicing file, including missing data or data errors that may have been made by prior servicers. They will also be responsible for any missed milestones or servicing errors made by the transferor servicer that may carry over. These requirements and the due diligence that they have engendered have lengthened the time to complete servicing transfers and the complexity in completing them. This potential liability— exacerbated by the lack of a common market definition of a complete servicing file — has resulted in a material impact to the liquidity of the servicing market, including a lack of bids for some servicers.

This regulatory regime may make it impossible for a transfer when a servicer is failing or severely distressed. As such a servicer may also have data quality or other issues due to exigent circumstances, it is unlikely that another servicer would be willing to purchase such a portfolio with the attendant liability. Such strict successor liability thus contributes to market illiquidity and could actually have the perverse effect of "trapping" consumers at a failing servicer if better servicers are unwilling to take on the portfolio. The CFPB should think of providing clear guidelines for such cases — not situational responses — to ensure consistency and allow for clarity in pricing and possible liability.[17]

c. *The rule should expand the timeframe for certain notifications to permit more thorough responses and reduce borrower frustration and confusion.*

The rule generally requires servicers to send a written acknowledgment of receipt within five days of receiving an information request, error notice, or loss mitigation application from a borrower.

In many situations, the information requested by a borrower can be provided in a shorter period of time but not within the short five day window.[18] Under the current rules, servicers

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[15] 78 FR 10820, 10821

[16] For instance, Nevada and Minnesota also have similarly duplicative overlapping regulations around loss mitigation applications.

[17] We recognize that CFPB guidance suggests that there is leeway in emergency situations, but this policy is not well-defined nor public. Such a policy should be clear, transparent and publicly available to ensure as much liquidity as possible in the event of such a distressed transfer.

[18] Similarly, an error can be corrected in a shorter period of time than allowed by the rule.

must send the acknowledgement notice even if the information requested can be provided just a few days later. We urge the CFPB to consider extending the alternative compliance period to avoid multiple notices in such a short period of time.

Similarly, we urge the CFPB to extend the time frame for sending an acknowledgement of receipt for loss mitigation applications. MBA agrees that timely review and communication with borrowers about their loss mitigation options is fundamentally important. However, in many situations, five days is too short a period to adequately review an application in order to determine if it is complete and if not, what information is needed to complete it. While the rule contemplates a procedure for requesting additional information after a notice of complete application has been sent,[19] providing servicers a longer period for review of the initial submission would allow for more thorough reviews and clearer borrower communication. This could prevent unnecessary borrower frustration from receiving a notice that their application is complete and then shortly thereafter, a notice that additional information is still needed.

d. *The CFPB should review the language used in its model notices and allow servicers to make non-substantive modifications while remaining within the safe harbor.*

The rule provides a safe harbor for servicers who choose to use the model forms for certain borrower notifications and as a result, many servicers have chosen to incorporate the model forms as templates for required notifications.

Unfortunately, many consumers find the language contained in the model forms to be off-putting. For example, servicers have received complaints from consumers about the force-place insurance notifications contained in Appendix MS-3. We urge the Bureau to consider modifying the language in the model forms to become more consumer friendly or expanding the safe harbor protections to permit servicers to make non-substantive alterations to the model forms. For example, Model Form MS-3(A) states "You should immediately provide us with your insurance information," but that same information could be conveyed by saying: "If you have already obtained insurance coverage on this property, it is important that we have that information so that we do not obtain or charge you for different insurance coverage. Please provide such information to us, at the address listed below, by [date required]."

e. *The CFPB should expand the small servicer definition.*

The rule provides exemptions from certain servicing requirements for small servicers. While we note that the definition of small servicer is found in TILA, we urge the CFPB to consider expanding to include more community-based mortgage companies, banks, and credit unions that operate in local or regional markets.

IV. Conclusion

MBA appreciates the opportunity to comment on the CFPB's proposed assessment plan for the RESPA servicing rule lookback. We hope that this is the beginning of a substantive conversation on the impact and effects of the rule, ways to analyze those effects and the accumulating burden that a lack of federal and national coordination around servicing standards places on mortgage servicers. We also look forward to discussing how the rule has helped consumers and ways that it can be simplified, modified or expanded to better serve borrowers.

[19] 1024.41(b)(2)(i)(B).

As our comments above highlight, MBA feels strongly that this review should encompass both facets of the CFPB's statutory mandate: ensuring access to financial markets and that those markets are fair and transparent. Such an accounting will necessarily involve discussions of the costs required to implement the rule and the effect that such increased costs have had on access to consumer credit. It should also involve an analysis of how CFPB's enforcement policy interacts with its supervisory role and whether a lack of regulatory clarity in this rule has reduced access to consumer credit.

Please feel free to reach out to me at PMills@mba.org or (202) 557-2878 or Justin Wiseman, Director of Loan Administration Policy at JWiseman@mba.org or (202) 557-2854 with any questions about these comments or suggestions on how MBA can assist with this important review.

Sincerely,

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