

October 9, 2012

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Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552

Re: *Docket No. CFPB-2012-0034; RIN 3170-AA14: 2012 RESPA (Regulation X) Mortgage Servicing Proposal. Comments from California Groups*

The undersigned California based organizations respectfully submit these comments on the proposed Mortgage Servicing Rules.

Without question, loan servicers have done tremendous, if not irreparable, harm to families and neighborhoods in our state and throughout the country. Uniform servicing standards represent an important opportunity to ensure that this damage is never again inflicted upon working families and their communities. But on this score, the CFPB has fallen short.

Our main reaction to this long awaited proposal is one of grave disappointment. There are three, broad critiques we have of the proposal:

1. The consumer protections for issues addressed by the rules are not strong enough. There are positive aspects of the rules, but many of these were required by the Dodd Frank Act. The proposals around loss mitigation are particularly weak, and we urge CFPB to reconsider finalizing its proposals around loss mitigation;
2. Not all critical issues are addressed by the proposed rules. Servicers have harmed Californians and our communities by unlawfully evicting tenants and failing to maintain REO properties, yet these issues are nowhere addressed; and
3. The proposal does not go far enough to ensure enforceability of the rules. CFPB should provide clarity around homeowners' ability to enforce their TILA rights against servicers, that RESPA cases can be filed based on a violation of the rules regardless of damages suffered, and that borrowers can seek both injunctive and compensatory relief.

We are particularly disappointed in that these rules may be a retreat from the hard fought victory of the California Homeowner Bill of Rights, which provides strong consumer protections and a private right of actions for violations. The HBOR was supported by a huge coalition of advocacy, consumer, labor, faith-based and community organizations.

1. Periodic billing statements.

We applaud the proposed required use of a periodic statement to consumers to provide information on partial payments, payment-option loans and information related to delinquency.

2. Adjustable-rate mortgage interest-rate adjustment notices.

CFPB's proposal would significantly improve the disclosures regarding interest rate adjustments, and make them more timely and transparent. We agree with the proposal to extend the requirement to all ARMs, not only "hybrid," and to include additional basic information.

We propose that CFPB increase the minimum time for providing notice from 60 to 90 days to allow the borrowers a more realistic opportunity to obtain refinancing to avoid a payment increase and potential payment shock and default.

We disagree with CFPB's failure to require the inclusion in these notices of the following helpful information: a list of alternatives consumers may pursue, including refinancing, renegotiation of loan terms, payment forbearance, and pre-foreclosure sales; contact information for the appropriate State housing finance agency; and information on how to access government-certified counseling agencies and programs.

While the language in the disclosures regarding negative amortization is helpful, a more pointed warning about this very dangerous phenomenon is warranted. We join National Consumer Law Center (NCLC)'s recommendation that disclosures apply to any change in interest rates. We further agree with NCLC's comment that payment option ARM loans should be banned outright. All too many of our clients were inappropriately signed up for these products, and many of them ended up losing their homes and nest eggs because of them.

3. Prompt payment crediting and payoff payments.

Abuses and arbitrariness in the receipt and handling of partial payments seem to occur regularly. We believe: the periodic statement should distinguish between the effect of partial payments on fully amortizing versus payment-option loans, as well as the effect of partial payments on delinquency; the periodic statement should include a description of the payment dispute process, a summary of the borrower's rights under the QWR process, and a recommendation that consumers review their credit reports to ensure they can address any derogatory information arising from this issue; and any modified payments resulting from a trial or permanent modification should be reflected on the periodic statement.

To ensure that limited English proficient borrowers understand the important information about their financial obligations contained in the periodic statements, servicers should provide these documents in non-English languages when appropriate. CFPB could consider requiring servicers to send borrowers a simple, multilingual notice each month for the first three months of the loan asking the borrower to indicate in which language they prefer to have notices sent. CFPB should consider developing a form for this purpose to assure standardization and to reduce costs to the industry of developing such a notice.

Late fees should not be included in the definition of a full contractual payment.

We agree with the proposed requirement that accumulated partial payments that amount to a full payment be applied to the oldest amount owed first.

We strongly encourage the CFPB to hold institutions to one clear rule when it comes to the handling of partial payments, so that there is no ambiguity or uncertainty for either institutions or borrowers. If servicers are permitted to return partial payments to the borrower, they should have to do so promptly.

Whatever the final rule, smaller servicers should not be exempt. If a servicer is too small or too under-resourced to follow minimum standards of servicing, it should not be in the servicing business. Employing insufficient staff is a business decision that servicers have made, and it is one that hurts consumers.

Housing counseling information should be included on every statement sent to borrowers, even those who are current. Counselors can be a great resource, even pre-delinquency, and providing greater access to them would be better for the industry and consumers alike.

We believe that the provision of an account statement automatically to a delinquent borrower is excellent. Account statements should be provided to borrowers electronically in Excel format, mirroring the current proposed Bankruptcy Court rules. This will be easier for many consumers to read and will impose minimal burden on industry.

4. Force-placed insurance.

We support the CFPB's proposal requiring a servicer to advance funds from escrow accounts to pay the premium on hazard insurance in order to avoid forced placed insurance in the event the borrower fails to pay the premium. However, we believe that this requirement should also apply to borrowers who do not have escrow accounts. This requirement will greatly reduce the number of occasions where a servicer would need to force place hazard insurance.

5. Error resolution and information requests.

There are several positive aspects of this section of the proposed rules; namely it clarifies that borrowers have right to request information even if they are not asserting an error; dispenses with technicalities about whether a particular request is a valid QWR ("Any valid qualified written request is a valid notice of error or information request. An invalid qualified written request may still be a valid notice of error or information request"); permits notices of error to be made orally as well as in writing; and prohibits servicers from charging fees or requiring account payments to investigate or resolve an error or to respond to a request for information.

Yet, we have serious concerns with other aspects of this part of the proposed rules. First, the current proposal includes an exclusive list of types of errors covered by the regulations and another list of types of errors/issues excluded. We recommend that the proposal be changed to include the list of excluded types of error/issue with a *non-exhaustive* list of types of errors covered and a catch-all provision that allows borrowers to seek redress for other types of servicing errors not listed explicitly.

Whether or not the change above is made, the CFPB should, at a minimum, add the following types of errors to the “covered” list: Failure to credit a payment according to these regulations; delays and errors by *transferee* servicers: various types of errors relating to escrow accounts that would not be covered by the proposed regulation, and certain loss mitigation-related errors should be covered (including: miscalculation of income, use of incorrect inputs in an NPV test when the correct inputs were available to the servicer and are objectively verifiable, and delayed reconciliation of loan modification agreements).

In addition, the list of excluded errors – relating to origination, underwriting, securitization, and determination to assign or transfer servicing – is overly broad. In particular, securitization and transfer of servicing can directly impact the ability of the homeowner to remain in the home, and impinge on the servicer-borrower relationship.

The “small servicer” exemption is inappropriate. If a small servicer is unable to comply with reasonable obligations and standards, perhaps it should not be a servicer at all.

We recommend that CFPB require that a contact phone number, email address, and postal address for notices of errors and information requests be available online and in mailed notices.

Servicers should also be required to provide an online option for borrowers to submit notices of errors. Providing an online method of notifying the servicer of an error is cheaper and more efficient for borrowers and servicers, since it entails no costs associated with hard-copy notices (e.g., printing, mailing, and scanning). This method also prevents the problematic dynamic in verbal notices of error, where servicers and borrowers commonly assert different accounts of the content and timing of such verbal notices.

We also note problems with the notices regarding foreclosure sales. Servicers must be required to communicate with borrowers in writing. We are very concerned that the “alternative compliance” option relating to postponement of foreclosure sales allows the servicer to ignore a valid request for postponement then simply send a letter stating there was no error without having to actually conduct an investigation or provide the borrower with support for its finding. Given how frequently errors are made that result in premature or unwarranted foreclosure sales, we view this as a serious flaw in the proposed regulations.

The proposed regulation fails to consider and address situations in which the servicer makes an inaccurate finding of no error or does not fully or adequately address a noticed error.

The proposed regulation contains exemptions for “overbroad” or “unduly burdensome” notices of error or requests for information. We are concerned that the definition of “unduly burdensome” will result in exemptions from response and investigation obligations in cases where the servicer’s errors are especially complicated.

Finally, we have concerns about the proposed rules regarding information requests. We believe borrowers are better protected if servicers are required to provide requested information in writing upon request by the borrower. Additionally, we request that CFPB provide examples of

types of information that are *not* “confidential, proprietary, or general corporate information” in order to avoid servicers’ overbroad application of this exception.

6. Information management policies and procedures (RESPA proposal).

There are positive elements to this proposal. But these positive components are potentially undermined by a broad safe harbor provision allowing for protection of servicers not engaged in patterns or practices of failures or violations. The examples of pattern or practice failures in this section are quite cursory, especially compared to the National Mortgage Settlement which implements quarterly reporting requirements and sets benchmarks for statistical compliance on a variety of practices and procedures, along with defined penalties and requirements to cure failures to comply.

Additionally, the creation of these policies is left largely to each individual servicer, which will likely result in inconsistent standards and practices throughout the mortgage servicing industry—exactly what the regulations are intended to alleviate.

Finally, CFPB should require servicers to provide borrowers with verification of their right to foreclose before beginning the foreclosure process.

7. Early intervention with delinquent borrowers.

The servicer should be required to contact each borrower telephone number on record (home, cell, work). Additionally, the servicer should be required to leave a message with relevant information when the borrower telephone number on record provides a voicemail option.

The provisions bewilderingly state that a “servicer is not required to describe specific loss mitigation options.” Servicers should provide borrowers with information regarding all loss mitigation options, and how to apply for them.

8. Continuity of contact with delinquent borrowers.

Critically, the multi-state Attorney General Settlement agreement goes beyond the proposed regulation’s requirements on Single Point of Contact by requiring servicers to actually carry out actions, as opposed to merely requiring servicers to “establish policies and procedures.”

The electronic portal point is very important. Some servicers refuse to communicate over email, in an obvious effort to avoid a paper trail which could result in the servicer being held accountable for erroneous communications or lack of responsiveness. Servicers need to be required to provide not only telephone but email access.

In the common scenario where servicing rights are transferred, subsequent servicers should be required to make a specific request for documents and to make reasonable efforts to obtain them

from the prior servicer if they're not promptly provided at the time servicing rights are transferred.

The safe harbor provisions are overly broad. So long as the servicer has the right "policy" and "procedure" and does not commit widespread violations of that policy, there is no liability on the servicer for failing to follow the policy or procedure. This renders the standards of very limited use to individual homeowners, who will not have any knowledge of widespread violations. This provision should be eliminated or substantially narrowed.

9. Loss mitigation procedures.

These proposed regulations fail to implement meaningful loss mitigation procedures and benchmarks. As such, we support the suggestion of National Consumer Law Center to remove these provisions from the proposal unless they are substantially strengthened.

Below, we identify concerns and recommendations for what should be in any final rule relating to loss mitigation procedures. CFPB needs to look to the National Mortgage Settlement and the California Homeowner Bill of Rights which contains strong borrower protections. Among our concerns:

- The proposed regulations don't really end dual tracking. This is a huge step backwards. The proposal allows each servicer to require a borrower to submit a complete loan modification application by as far as 90 days in advance of a foreclosure sale to receive protections under the loss mitigation rules. A deadline this far out is unrealistic in many non-judicial foreclosure states like California, where foreclosures can be completed in as little as 110 days and when borrowers may not know of a foreclosure sale date until 20 days before the sale. The deadline this early is also inconsistent with the National Mortgage Settlement.
- No requirements are placed upon servicers to adhere to any guidelines when making loan modification determinations.
- Borrowers who are deemed to have submitted incomplete loan modification applications must be given a reasonable amount of time to complete them. More guidance is needed to ensure that servicers don't run out the foreclosure clock on borrowers.
- When borrowers are denied loan modifications, servicers must provide specific reasons for investor denial, including copies of the relevant provisions of any Pooling and Servicing Agreement, as well as the identity of the objecting investor or inventors.
- When servicers notify borrowers of their right to appeal loan modification denials, they should provide referral information to housing counseling and legal service offices.
- Given the cutbacks for housing counseling services, it may be incredibly difficult to schedule a live meeting with a housing counselor to discuss the servicer's offer and determine if it is fair or whether the borrower should qualify for other modification programs or better terms. In several sections, the servicer is given the option of extending a deadline by 15 days with notification to the borrower. Likewise, the borrower should have the option to extend the deadline to accept the offer upon notification to the servicer.

- Failure to require servicers to adopt loss mitigation measures, including loan modifications, seems to significantly undermine the notion of “national servicing standards” that are designed to provide the same protections for borrowers, regardless of who happens to service their loans. In addition, even for those servicers who are covered, the regulation leaves it to the servicer to determine the eligibility criteria. Servicing standards must include specific and consistent obligations of all servicers to provide all homeowners meaningful opportunities to keep their homes.

What the proposed regulations fail to address

According to Tenants Together, over 38% of households directly impacted by the foreclosure crisis in California are renters; however, these proposed rules completely ignore renters. CFPB should add to these proposed rules that servicers must follow existing federal laws like the federal Protecting Tenants in Foreclosure Act, as well as state and local laws that provide certain protections to tenants, including those living in Real Estate Owned Properties and other properties in the control of servicers. These laws and ordinances are in place to prevent unlawful evictions and displacement of families, habitability, harassment, seizure of security deposits and other problems that unfairly and substantially have harmed thousands of California renters. These laws and ordinances are routinely violated by servicers, and CFPB must help stop this.

In addition, servicers routinely harm communities by failing to maintain properties. The resulting habitability and vacancy issues contribute to blight, criminal activity, and decreased property values which keep our communities mired in crisis. CFPB must require servicers to repair all REO and other properties in their control to an FHA financeable standard, so that homeowners with FHA loans will be able to purchase the home on the open market. To do otherwise perpetuates fair housing violations created by the following dynamic:

- Neighborhoods of color are most impacted by the foreclosure crisis and distressed REOs;
- National Fair Housing Alliance has found that neighborhoods of color are disproportionately impacted by poor REO property maintenance and marketing practices;
- Borrowers of color are most likely to rely on FHA financing to purchase a home;
- FHA financing is only available for homes that pass an inspection, which makes it impossible for FHA borrowers to compete with cash investors to purchase REOs.

Poor property maintenance standards result in more and more properties on the market being distressed, which gives cash investors an unfair advantage in bidding, creating neighborhoods characterized by absentee landlords and low property values.

Finally, we strongly urge CFPB to require translation of all notices and documents going to borrowers. Lenders and brokers were only too willing to negotiate predatory and abusive loans in non-English languages, yet servicers have by and large been unwilling to provide meaningful access to Limited English Proficient consumers trying to rework these same loans. In California, state law has identified five languages spoken by many LEP families in our state, and we urge CFPB to build off of this list to make the transparency CFPB strives for readily accessible to all.

Conclusion

We urge CFPB to act boldly to strengthen protections for consumers as discussed above; include additional provisions that require servicers to follow tenant protection laws and ordinances and repair properties to prevent blight; and clarify that consumers harmed by servicers' failure to follow these rules may meaningfully enforce their rights in court.

These rules must take effect within six months of being finalized. Many of these provisions are taken from the Dodd-Frank Act which was passed over a year ago, and the Attorney General Settlement agreement which was finalized several months ago. There should be no undue burden for servicers trying to comply. And California communities can wait no longer for relief.

Thank you for consideration of these views. Should you have any questions, please feel free to contact Maeve Elise Brown at (510) 271-8443, Stacey Yawney at Public Counsel at (213) 385-2977 x 373, James Zahradka at the Law Foundation of Silicon Valley at (408) 280-2423, or Kevin Stein at the California Reinvestment Coalition at (415) 864-3980.

Very Truly Yours,

Housing and Economic Rights Advocates
California Reinvestment Coalition
Law Foundation of Silicon Valley
National Housing Law Project
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