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National Association of Federally-Insured Credit Unions

May 7, 2021

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X (Docket No.: CFPB-2021-0006)

Dear Sir or Madam:

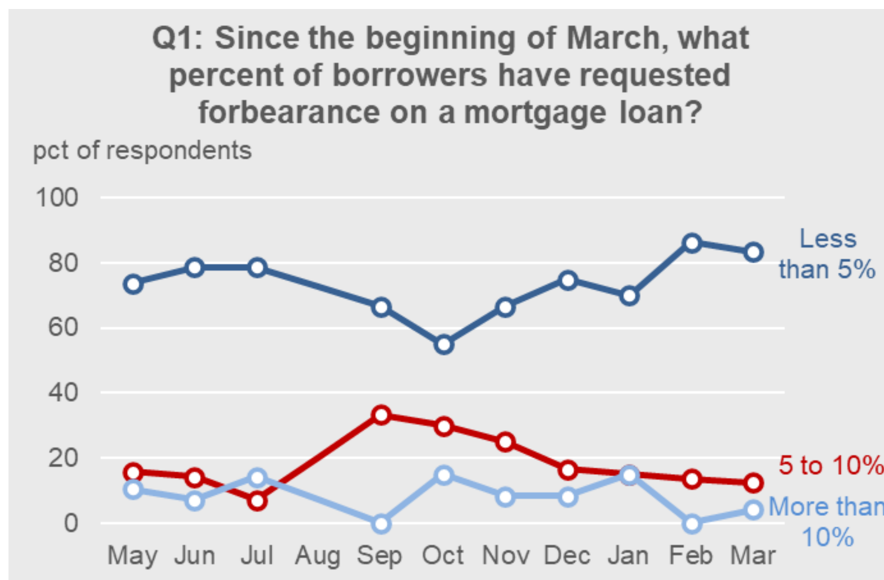
On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Bureau of Consumer Financial Protection's (Bureau or CFPB) notice of proposed rulemaking regarding temporary revisions to Regulation X to protect borrowers affected by the COVID-19 pandemic. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 124 million consumers with personal and small business financial service products. NAFCU appreciates the Bureau's efforts over the last year to assist consumers impacted by the COVID-19 pandemic. In particular, the Bureau's June 2020 interim final rule (IFR) relaxed the requirement to obtain a complete loss mitigation application and conduct an evaluation of the borrower for certain loss mitigation options. NAFCU urges the Bureau to provide clarity surrounding this rule's early intervention requirements and the streamlined loan modification option to reduce implementation burdens on servicers. NAFCU does not agree that the proposed pre-foreclosure review period prohibiting an initial foreclosure notice or filing until December 31, 2021 will assist borrowers as intended, and requests that the Bureau provide explicit exceptions to the prohibition should the agency finalize as proposed.

General Comments

The Bureau finalized the mortgage servicing rules in 2013 following the Great Recession to establish procedures for mortgage servicers in evaluating loss mitigation applications from borrowers and set requirements for communications with delinquent borrowers. Generally, Regulation X prohibits a servicer from making the first notice or filing for foreclosure until the borrower's mortgage loan is more than 120 days delinquent. In drafting this proposal, the Bureau is utilizing its authority under section 19(a) of RESPA, which authorizes the Bureau to prescribe rules and regulations, to make interpretations, and to grant reasonable exemptions to achieve the purposes of RESPA, including consumer protections. Consumer protection purposes include ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers prevent avoidable costs and fees, and facilitating review for foreclosure avoidance options.

Although the Bureau notes that these proposed amendments are intended to achieve some or all of the RESPA purposes, the Bureau is taking a broad interpretation of the statutory consumer protections by placing a moratorium on foreclosures until the end of 2021 Credit unions adhere to Regulation X's strict requirements to ensure they protect their members and provide awareness of all available options to avoid foreclosure. Some of the proposed amendments enhance the statutory consumer protections, and NAFCU encourages amendments that provide additional loss mitigation options. Also, the Bureau utilizes its authority under section 1032(a) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank) which enables the agency to prescribe rules regarding the disclosure of features of consumer financial protection products and services. The broad authority granted under section 1032(a) would seem to suggest that the Bureau may use it to require the proposed early intervention requirements to enhance disclosure of options available to borrowers. But this broad authority does not appear to extend to the pre-foreclosure review period which does not require a disclosure of any kind to the borrower. It simply provides more time for a borrower to decide. The Bureau should re-examine its authority under Dodd-Frank and RESPA to promulgate this proposal.

Despite the Bureau's argument that the current mortgage servicing rule is insufficient to facilitate review for forbearance avoidance, the data utilized indicates the dramatically decreased number of borrowers in an active forbearance program which seems to suggest that the current rule is working as intended with the temporary flexibilities the Bureau provided in 2020. Similarly, NAFCU members have reported a decrease in the volume of forbearances. As depicted below, most credit unions have reported that, on average, fewer than five percent of their borrowers are requesting a loan forbearance. This figure has remained relatively consistent since May 2020.



Source: NAFCU

According to NAFCU's July 2020 *Economic & CU Monitor Survey,* 11 percent of respondents were severely concerned about the volume of forbearances increasing over the next year. Since then, credit unions have made proactive efforts in preparation of an increased forbearance request

volume, including improved automation to better handle the higher volume. NAFCU members continue to promote the availability of forbearance and other COVID-19-related hardship programs through various communication channels such as credit unions' websites, emails, social media, and telephone communications.

More recently, in NAFCU's January 2021 *Economic & CU Monitor Survey,* 52 percent of credit unions reported that there is no likelihood of delinquency after borrowers exit forbearance and another 33 percent of credit unions reported that there is a likelihood of between one to five percent of borrowers experiencing delinquency after exiting forbearance. Again, credit unions are expecting low delinquency rates once members exit a forbearance program, and this data was collected prior to the federal moratorium extensions until June 30, 2021. Certainly, foreclosure is the last resort that both credit unions and borrowers wish to take when a loan becomes delinquent, but the prohibition on a credit unions' ability to foreclose on a mortgage until the end of 2021 may actually be more problematic for all parties.

Early Intervention Requirements

Credit unions have proactively assisted borrowers during this last year and continue to aid and inform them of further forbearance and loss mitigation options. The proposal would require credit unions to take additional actions during live contact with borrowers, based on whether a borrower has entered a forbearance program or not. Communications with both groups of borrowers will certainly meet the Bureau's goal in helping disseminate information to borrowers who are otherwise eligible for programs to mitigate any possible foreclosure. Credit unions know their member-borrowers best and the unique circumstances members may find themselves in, and will continue to provide individualized attention, as necessary. NAFCU asks that the Bureau clarify whether this additional early intervention requirement is necessary if the forbearance program is based on an evaluation of an incomplete loss mitigation application. Earlier guidance seemed to suggest that servicers did not have to comply with the live contact early intervention requirements if they have established and maintained ongoing contact with borrowers in compliance with the loss mitigation rules in section 1024.41 of Regulation X. Given the myriad of COVID-related guidance regarding mortgage servicing it is important that credit unions have clarity.

Despite the early intervention requirements assisting in the Bureau's overall purpose, the Bureau should be aware of the associated implementation burdens. Given that the proposal requires additional required information, credit unions must revise their internal policies, procedures, and servicing scripts. In addition, credit unions must adjust tracking systems to ensure compliance with the additional requirements. Tracking is operationally burdensome as this is built into credit union systems and must be adjusted with each temporary revision or change. Despite the availability of tracking options during the COVID-19 pandemic, there were still manual efforts on the part of credit unions as the available tracking options do not always comport with the situations that must be tracked. Additional measures to ensure proper tracking only exacerbates overall compliance burdens.

Streamlined Loan Modification

The proposal permits servicers to offer a "streamlined loan modification" option for borrowers with a COVID-19-related hardship based on the evaluation of an incomplete application that meets certain criteria. In general, NAFCU is supportive of streamlined options that remove the general requirement to obtain and evaluate a complete loss mitigation application and has previously urged the Bureau in our August 13, 2020 letter to adjust the regulations to account for the practices of the government-sponsored enterprises (GSEs) Flex Modification Program. Prior to this, credit unions were in a position where they had to obtain a complete loss mitigation application, making the process lengthier for struggling borrowers needing assistance. Streamlined options also assist with servicer capacity. As proposed, the streamlined loan modification option may conflict with the existing guidance from investors in the market. As the Bureau highlighted, the streamlined loan modification is intended to align with the GSEs and Federal Housing Administration (FHA), but it is not identical. In particular, the proposal highlights that certain programs, including the GSEs Flex Modification Program, can involve other features such as the capitalization of past due amounts. The proposal notes that it will not prohibit the incorporation of that feature to qualify for the streamlined loan modification; however, NAFCU asks that the Bureau clarify in other situations whether servicers should follow the Bureau's guidance on required factors if they conflict with investor guidance.

Emergency Pre-Foreclosure Review Period

The proposal adds a mandatory pre-foreclosure review until December 31, 2021 for those borrowers experiencing a COVID-19-related hardship. The Bureau rationalizes the additional pre-foreclosure review period as a "final backstop" to ensure borrowers have the opportunity to be evaluated for loss mitigation. However, the Bureau's amendments to the early intervention requirements, coupled with the current mortgage servicing rule, serve as a sufficient backstop to ensure borrowers are aware of and have a meaningful opportunity to be evaluated for loss mitigation options.

The proposal delays the ability of credit unions to proceed with a judicial or non-judicial foreclosure process against delinquent borrowers by prohibiting servicers from making the first notice or filing for foreclosure. NAFCU encourages the Bureau to provide flexibility, where possible, in terms of documents that a credit union can provide to a member without triggering the first notice or filing. In certain circumstances, the documents associated with the first notice or filing can prompt communication between the member and credit union where a member was previously non-responsive to communications.

In addition, the pre-foreclosure review may cause a strain on liquidity as servicers may need to provide for the continued payment of taxes and insurance in escrow accounts or other costs required in the underlying contract. Early in the pandemic, NAFCU members expressed concern regarding liquidity in offering forbearances. This was especially concerning before the GSEs announced their policy limiting the number of payments servicers were required to make. Those

servicers experiencing a minor to moderate strain on liquidity will likely feel a deeper impact due to the proposed three-month pre-foreclosure review period.

Should the Bureau finalize the proposed pre-foreclosure review period, NAFCU supports the Bureau's proposed exemptions, which include situations where the borrower does not qualify for any loss mitigation program or declines all available options, and where a borrower does not respond to communications by the mortgage servicer. Both scenarios reflect situations that frustrate the process for all parties. Servicers need some flexibility if the Bureau intends to finalize the pre-foreclosure review period as proposed. One of the reasons for this additional pre-foreclosure period is to assist with servicer capacity but the proposal does not alleviate capacity concerns if the foreclosure moratoria end on December 31, 2021. Instead, servicers will face potentially higher volumes of loss mitigation applications and default servicing in January 2022. The same situation the Bureau is attempting to rectify will transpire just a few months later. As noted in the proposal, servicers have had time to adjust and plan for increased volume according to their needs. Allowing for exemptions from the pre-foreclosure review period so a servicer may file the first notice or filing will ease servicer capacity issues, as loss mitigation applications may come in waves.

Conclusion

NAFCU appreciates the opportunity to share its members' concerns about the proposed rule amending the mortgage servicing rules. NAFCU urges the Bureau to provide clarity surrounding the early intervention requirements and streamlined loan modification option to reduce implementation burdens on servicers. NAFCU generally opposes the proposed pre-foreclosure review period prohibiting the initial foreclosure filing until December 31, 2021, and requests that the Bureau provide exceptions to the prohibition should the agency finalize the prohibition as proposed. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2249 or kschafer@nafcu.org.

Sincerely,

Kaley Schafer
Senior Regulatory Affairs Counsel