CONSUMER MORTGAGE COALITION
CREDIT UNION NATIONAL ASSOCIATION
NATIONAL ASSOCIATION of FEDERAL CREDIT UNIONS

May 26, 2016

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

Dear Ms. Jackson:

Re: Docket No. CFPB–2016–0016
RIN 3170–AA49

The Consumer Mortgage Coalition ("CMC"), Credit Union National Association ("CUNA"), and the National Association of Federal Credit Unions ("NAFCU"), with the Mortgage Servicers Working Group, appreciate this opportunity to submit comments on the Consumer Financial Protection Bureau's ("CFPB") report on consumer testing of periodic statements for borrowers who have filed a bankruptcy petition (the "Report").

I. Overview

We greatly appreciate that the CFPB reached out to a number of servicers to learn about their current practices and about the capabilities of their statement production systems. Through this approach, the CFPB has the opportunity to learn how operationally feasible certain changes would be and why. This will help prevent unforeseen outcomes, such as requirements that are disproportionately costly in relation to their benefits, or that make compliance more difficult than it needs to be. It is preferable to know the impact of amended regulations before the amendments are final.

While we appreciate the opportunity to comment on the testing, we note that the statements have only limited meaning without their accompanying regulation. In several areas, we are unable to understand what the statements reflect because we do not have an accompanying regulation that would implement the statements. The only way to obtain robust comment is to publish both the statements and their regulation for comment together. If there are multiple statements under consideration, there may need to be multiple versions of some aspects of the regulation as well.

We are disappointed with the sample sizes used in the testing. The sample sizes were far too small to be yield reliable results. Nevertheless, we provide comments where we can, followed by technical comments on the statements.

II. Testing Results

Unfortunately, the testing results are not reliable for a number of reasons.

- The sample was simply too small, with only 51 test participants altogether. The sample size was even smaller for the individual tests because each participant only joined one of the three rounds of testing. There were only 17 participants for each round of testing of two sets of statements. Further, the participants within each round only reviewed statements for one bankruptcy chapter, so that only seven to ten participants looked each of the statements.[1] A sample size of no more than ten per statement is very small. The results are inconclusive and unreliable because of the small sample sizes.
- The testing did not take into consideration trustee communication with consumers. Trustee communication varies, with some trustees sending specific letters or communications describing payment requirements and next steps, while others send less information. Regardless of the variation, trustee information can support or detract from consumer understanding of their bankruptcy cases.
- The testing did not consider statements for loans on which the consumer sends post-petition maintenance payments to the trustee.
- All test participants were consumers. We believe that testing should have included bankruptcy judges, bankruptcy attorneys, and mortgage servicers as well. That would have provided input based on experience with, in some instances, thousands of consumers a month.
- There was no control group of statements, and each successive round of testing introduced multiple changes. The results from the three testing rounds differed, but without a control, we cannot know what caused the differing results.
- The testers selected 42 of 51 participants who had reported "trouble making mortgage payments within the last two years." The "trouble" standard appears quite subjective. This criterion does not mean that the participants had trouble making payments during an active bankruptcy case or on a loan that had been discharged. As the Report states, "not all participants had a mortgage while in bankruptcy; [ ] not all participants were delinquent on their mortgages when they filed for bankruptcy; and [ ] not all participants had bankruptcy experience."[2] The "trouble" does not appear to related to testing the statements.
- The testing included eye-tracking for five or fewer participants with one of the Chapter 7 statements. The Report acknowledges that this sample is too small "to extrapolate that the general population will all interact with the forms in the same way that this set of participants did."[3] The Report instead states that the results

[1] Report at 4.

[2] Report at 4-5.

[3] Report at 82.

should "inform future form revisions,"[4] although the information is not reliable and does not indicate how consumers would review the statements.

- Only 29 participants had Chapter 7 or 11 experience, and only 18 participants had Chapter 13 experience.[5] Further, testing took place in only three locations, although there are 93 bankruptcy jurisdictions. Three is too few to be meaningful because bankruptcy case administration varies by jurisdiction. The small number of participants with bankruptcy experience and the small number of jurisdictions is surprising because of the number of consumer bankruptcy cases. In 2014, there were 909,812 cases, and in 2015 there were 819,760.[6]
- Some participants had no bankruptcy experience.
- The testing appears to lead to a conclusion that whatever testing shows is popular should be required. This is too narrow a focus, and the small sample sizes are not a sufficient basis for a rulemaking. The Bankruptcy Code, for one example, is also relevant. One participant stated, "I don't know why anybody would *not* want to receive these notices[,]"[7] referring to a Chapter 7 statement. Bankruptcy law restricts certain communications regardless of debtor preference. Or, as another participant said referring to a Chapter 13 statement, "You shouldn't get a bill when you're in bankruptcy. So why am I still getting a bill?"[8] The fact that someone may report liking the idea of a statement does not mean that the statements are providing useful and necessary information.

[4] Report at 82.

[5] Report at 3.

[6] These figures are from the Administrative Office of the United States Courts, in Reports F-2 for calendar 2014 and 2015.

[7] Report at 13.

[8] Report at 14.

III. Substantive Recommendations

A. Implementation Time

We do not know how much time the CFPB has in mind for servicers to implement the new bankruptcy statements. Unlike the mortgage regulations that the CFPB finalized in 2013, this rulemaking is not subject to the Dodd-Frank Act Title XIV requirement that regulations be final by January 2013 and be effective 12 months thereafter.[9] Indeed, the CFPB removed the bankruptcy statements rulemaking from the Dodd-Frank deadline by interim final regulation in 2013. That interim rule "clarif[ied] compliance requirements in relation to bankruptcy law[.]"[10] The CFPB "concluded that further analysis and study are required to resolve other issues that cannot be completed before the 2013 Mortgage Servicing Final Rules take effect. In those cases, the Bureau is creating narrow exemptions from the servicing rules to allow time to complete the additional analysis."[11] The interim regulation postponed a portion of the periodic statements requirement so the CFPB would have time to resolve the conflicts between the Bankruptcy Code and a broad requirement to send monthly billing statements to mortgage borrowers. That decision was the only feasible option for the CFPB. Writing a bankruptcy statement regulation, while also revising many other mortgage regulations, in 18 months was not workable.

A new requirement for bankruptcy statements will take time to implement. The mortgage industry is still implementing many revised regulations, including TILA-RESPA Integrated Disclosures ("TRID") and Home Mortgage Disclosure Act amendments. The HMDA amendments require very substantial systems changes, and become effective on January 1, 2018.[12] At the same time, Fannie Mae and Freddie Mac (the "GSEs") are about to release a revised Uniform Residential Loan Application ("URLA"), with an effective date of January 1, 2018, although the GSEs will allow lenders more time to begin using the new application.

The HMDA and URLA amendments, like the bankruptcy statements, will require an enormous amount of systems changes. Many financial institutions, especially credit unions, would benefit from having at least six months after the HMDA implementation period to focus on the mortgage servicing amendments.

We recommend that the CFPB provide the industry 24 months to implement the new bankruptcy statements, so that the HMDA amendments will not unnecessarily interfere with the new statements.

---

[9] 12 U.S.C. § 1601 note.

[10] 78 Fed. Reg. 62993, 62994 (October 23, 2013).

[11] *Id*.

[12] 80 Fed. Reg. 66128 (Oct. 28, 2015).

B. A Single Statement Would Reduce Regulatory Burden

The testing used separate statements for Chapters 7 and 13. It does not follow that servicers should be required to implement two separate bankruptcy statements. Servicers should be able to implement one statement, and include or suppress information as appropriate for different bankruptcy chapters. This approach would greatly simplify the regulatory burden, both during implementation and in producing the monthly statements thereafter.

To support this sensible approach, we recommend that the CFPB limit the differences between Chapter 7 and Chapter 13 statement requirements as much as possible, consistent with bankruptcy law requirements. There is no reason under the Truth in Lending Act ("TILA") for the statements to differ, so all differences should derive from bankruptcy law.

For example, if the statements for both chapters will require the same or similar explanations about partial payments or the same or similar bankruptcy disclaimers, it should be permissible to place that information in the same location on all bankruptcy statements. Also, Chapter 7 statements will suppress the Chapter 13 Arrearage box, but there should be no requirement to fill that space on Chapter 7 statements with other information. Suppressing the box in Chapter 7 statements should be sufficient.

This approach is consistent with a TILA safe harbor.[13] This safe harbor applies even if a disclosure omits inapplicable information or rearranges the format or layout of the disclosure.

We recommend that the CFPB's final regulation permit servicers the flexibility to reduce regulatory burden by aligning the statements across chapters where possible.

[13] TILA § 105(b), 15 U.S.C. § 1604(b), provides:
"A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this title with respect to other than numerical disclosures if the creditor or lessor
(1) uses any appropriate model form or clause as published by the Bureau, or
(2) uses any such model form or clause and changes it by
(A) deleting any information which is not required by this subchapter, or
(B) rearranging the format, if in making such deletion or rearranging the format, the creditor or lessor does not affect the substance, clarity, or meaningful sequence of the disclosure."

C. Disclaimers and Explanations Need Flexibility While Servicers Need the Safe Harbors

The several tested statements contain a variety of disclaimers, usually in the Bankruptcy Notice, and several explanations of payments to trustees, partial payments, and Chapter 13 arrearages. We assume this variety is due to the difficulty of creating one set of disclaimers and explanations that will fit all purposes and satisfy all bankruptcy courts. Satisfying all bankruptcy courts simultaneously is not easy. For example, the Advisory Committee on Bankruptcy Rules spent significant effort over several years trying to create a consensus on a uniform Chapter 13 plan, but bankruptcy judges could not agree on one. It is not reasonable to believe that one version of disclaimers or explanatory text in bankruptcy statements can satisfy every bankruptcy judge. Additionally, as case law changes, servicers may need to change their communications with bankruptcy debtors. As consumers begin reacting to the new statements, servicers may find that additional or different explanations are appropriate, based on consumer understanding and feedback. We encourage the CFPB to permit servicers to draft and use their own bankruptcy disclaimers and explanations, and to modify them without the need for a CFPB rulemaking. As the CFPB is undoubtedly aware, dozens of different bankruptcy messages and disclaimers have passed bankruptcy court scrutiny, and these should be acceptable to the CFPB as well. *See, e.g., In Re Biery*, No. 10-23338, at n. 12 (E.D. Ky. Dec. 11, 2015), which contains a summary of case law on bankruptcy statements.

While servicers need flexibility to adapt their disclaimers and explanations, making those adaptations should not remove bankruptcy statements from either of two safe harbors for use of CFPB model disclosures. One of the safe harbors is in TILA § 105(b), discussed above. An additional safe harbor is in the Dodd-Frank Act.[14] Neither of the safe harbors relates to bankruptcy law.

While the safe harbors are important, they can lead to unfortunate results if they do not permit flexibility. After the CFPB's 2013 servicing regulation was final and before the CFPB released its interim final regulation, servicers began implementing the new periodic statement requirements with no bankruptcy exemption, including using the new model statements to come within the safe harbor. One servicer that began to put the new statement into effect before the interim final regulation softened its bankruptcy disclaimers to be closer to the new model form. For example, instead of disclosing that a debt had been discharged, this servicer's revised disclosure said the statement is for informational purposes *to the extent* the debt had been discharged. A bankruptcy court criticized these changes. The judge had a strong preference for the prior form of the

[14] Dodd-Frank Act § 1032(d), 12 U.S.C. § 5532(d), provides:
"Any covered person that uses a model form included with a rule issued under this section shall be deemed to be in compliance with the disclosure requirements of this section with respect to such model form."

servicer's statement, while the servicer needs the safe harbors. The safe harbors and bankruptcy law should not overlap.

There is no reason they should overlap. The bankruptcy disclaimers and other explanatory text on the statements are the result of bankruptcy law and relate to bankruptcy issues. There is no reason for TILA or Regulation Z to dictate or apply to their content – TILA is not a bankruptcy law. At the same time, the fact that bankruptcy law and TILA both affect bankruptcy statements is no reason to remove two statutory safe harbors from bankruptcy statements altogether.

We urge the CFPB, by explicit regulation rather than commentary, to provide that content of the bankruptcy disclaimers and the explanatory disclosures on bankruptcy statements are not governed by TILA or Regulation Z, while the remainder of the statements are subject to TILA and Regulation Z with the two safe harbors.

D. Chapter 13 Funds in Suspense

We are concerned that Chapter 13 funds in suspense may be unclear in two ways, if the amounts in suspense reflect either the Chapter 13 treatment or reflect a combination of the Chapter 13 and the contractual treatments.

The confusion arises from the following facts. For Chapter 13 tracking, servicers separate pre- and post-petition funds in suspense. For Chapter 13 purposes, servicers apply a payment out of each these two suspense accounts (or "buckets") when that bucket, alone, has enough for a full payment. Separately and in addition, servicers track funds in suspense according to the loan contract, throughout the life of the Chapter 13 plan. The suspense bucket for contractual purposes does not distinguish between pre- and post-petition payments. Further, the amount of a post-petition maintenance payment sometimes differs from the amount of a contractual payment.[15] The amount in suspense for Chapter 13 purposes is not always the same as the amount in suspense for contractual purposes. This leads to the following concerns.

1. Total in Two Suspense Buckets May Exceed a Full Payment

The first concern is with explanations in the Round 2 and Round 3 statements that when the servicer receives enough partial payments to equal a full monthly payment, the servicer will apply those funds to the loan. (Round 1 Chapter 13 statements did not involve funds in suspense.) In statements B4, B5, and B6,[16] the amount of the pre-petition arrearage payment last month (in the Arrearage box in B4 and B5, and in the

[15] A loan may have an adjustable rate (or step payment) that decreased after a payment became due and before the servicer receives funds to apply to that payment.

[16] This letter references the tested statements by the letter and number in their upper-left corners.

Transaction Activity box in all three) is the same as the amount of unapplied funds received last month. This appears to mean that unapplied funds reflected on the statement include arrearage payments that are less than one monthly payment, as well as, we presume, post-petition payments that are less than one payment.

First, it is not clear whether the explanation about partial payments, that the servicer will apply funds upon receiving a full monthly payment, means a full contractual payment or a full post-petition maintenance payment.

Even if the relevant payment were clear, the treatment is not. Funds in the pre- and post-petition suspense buckets combined will sometimes total more than one monthly payment, while neither bucket individually has enough for one full payment. In this case, the servicer cannot apply a payment, under the Chapter 13 treatment. This appears inconsistent with the explanation about when the servicer will apply a payment.

2. Two Suspense Buckets Adds Confusion

The second concern is with statement C6, which shows funds in suspense broken down into pre- and post-petition buckets. This pair of suspense buckets sometimes will not be able to represent the contractual treatment.

In statement C6, the amount reflected in Unapplied Funds (Pre-Petition) apparently reflects the Chapter 13 treatment because there is no contractual pre-petition arrearage amount. At the same time, it appears from Round 1 that the Breakdown of Past Payments reflects the contractual breakdown.[17]

An example will illustrate how combining the Chapter 13 and the contractual treatments may not work. On a loan with a post-petition maintenance payment of $1000, a pre-petition arrearage payment of $200, and a contractual payment of $1050, a servicer receives a post-petition payment of $900 and a pre-petition arrearage payment of $170. The aggregate amount in both Chapter 13 suspense buckets, $1070, is more than one post-petition maintenance payment, but for Chapter 13 purposes, the servicer would place $900 in post-petition suspense and $170 in pre-petition suspense. At the same time, for contractual purposes, the servicer would be able to apply one payment and would have $20 remaining in contractual suspense. If C6 represents the contractual application of principal and interest in the Breakdown of Past Payments, it does not appear to provide a place to represent the $20 contractual suspense, and the servicer will not be able to accurately represent the contractual status of the loan.

[17] Round 1 tested statements for the same loan for two consecutive months. These statements appear to reflect a contractual principal-interest breakdown.

Although the Chapter 13 and contractual treatments differ during the plan, if the plan fails before completion, as most do,[18] the contractual treatment would be the only treatment remaining. If a consumer had seen only the Chapter 13 treatment, upon plan failure the consumer could be surprised and confused to see the principal amount apparently increase, possibly by a significant amount.

3. Recommendations

Chapter 13 statements should reflect the contractual principal-interest breakdown. Funds reflected as in suspense should be based on the contractual application. A statement about when the servicer applies partial payments should be explicit that it is upon receipt of a full contractual monthly payment.

We recommend against disclosing pre-petition arrearage or post-petition maintenance payments held in suspense, or mentioning that there are multiple suspense accounts, as in C4, C5, and C6. This is too confusing even with an explanation.

E. Pre-Petition Arrearage Should Be Reflected as Plan-to-Date Rather Than Year-to-Date

Only the proposed Chapter 13 statement reflects pre-petition arrearage payments as Paid Last Month, Paid Year to Date, and Current Balance of Pre-Petition Arrearage. Others reflect Paid (or Received) Last Month, Total Paid During Bankruptcy, and Current Balance of Pre-Petition Arrearage. Three statements also include the original claim amount. The tested statements used several names for these items. Regardless of the names, we believe that the amount paid plan-to-date is much more helpful for consumers than the amount paid year-to-date.

Chapter 13 arrearages are paid down over the life of the plan. The amount paid year-to-date, for Chapter 13 purposes, seems irrelevant and arbitrary. Consumers would benefit from seeing the amount of arrearages paid plan-to-date because it helps keep the focus on plan progress, and because of the chance that the plan could fail. A statement showing the payments year-to-date and the current balance would provide a sense of how well the plan is progressing, even if the post-petition payments are delinquent.

As to the three statements that include the original arrearage claim amount, this information is unhelpful in a monthly disclosure for two reasons. First, the original arrearage amount is in the servicer's proof of claim. Second, arrearage amounts are no longer static. Many trustees add amounts disclosed in Notices of Post-Petition Fees, Expenses and Charges to the arrearage. Following loan modifications, arrearages are often reduced drastically or eliminated all together. Monthly statements are designed to

[18] This is according to the Notice of Proposed Rulemaking, 79 Fed. Reg. 74176, 74206 (Dec. 15, 2015).

keep consumers up to date on information regarding ongoing payments. Consequently, the current arrearage balance is what the consumer needs, not the original arrearage claim amount.

Recommendation
Chapter 13 statements should reflect pre-petition arrearages plan-to-date rather than year-to-date. There should be no requirement to disclose the original claim amount in monthly statements.

F. Language Should Be Familiar

The tested statements varied the language they used to describe some items, such as varying between pre-petition arrearage and pre-bankruptcy debt. We believe the statement terminology should be as consistent with bankruptcy terminology as possible.

Filing a bankruptcy petition requires consumers to learn new terminology to understand the bankruptcy process and requirements. This is due to the Bankruptcy Code, and CFPB regulations will not alter that fact. Consumers learn all or almost all of what they ever know about bankruptcy from sources other than their mortgage statements. These statements should not be a bankruptcy primer, and mortgage servicers should not be consumers' primary source of bankruptcy knowledge.

There should be one set of bankruptcy terms to learn, and only one. This approach would minimize the amount of necessary learning overall. It would also would prevent having two terms to describe the same thing. Having two two terms for the same thing would create a tendency to think the terms have different meanings when they do not. It would also create a delay after consumers begin receiving their bankruptcy statements before they realize that the terms actually mean the same thing.

Recommendation
The statements' terminology should be as consistent with bankruptcy terminology as possible. Pre-petition arrearage is more appropriate than pre-bankruptcy debt. Chapter 13 disclaimers should not refer to "your mortgage payments" or "your regular monthly mortgage payments" but to post-petition payments or contractual payments.

G. Servicers Must Apply All Payments Contractually

Servicers are required to apply payments according to their contracts, and consumers for the most part must abide by the contract terms if they want to retain their property. A CFPB regulation should be consistent with mortgage contracts. The CFPB bankruptcy statements should reflect contractual payment application.

IV. Technical Comments

The following are technical comments, more or less in the order the items appear in the tested statements. We offer these comments to be helpful to the regulation drafters, and not to imply support for exact language. Servicers should be allowed to draw on bankruptcy court opinions and their experience with their customers to draft messages and bankruptcy disclaimers, without losing safe harbor protections.

A. Untitled Box

"Any" Fees

A reference to any fees implies all fees, but means only some fees.

- Statement B1 (Chapter 7) states, "(This amount includes only your regular monthly payments and **any** fees and charges. It does not include past due amounts.)"
- Statement B4 (Chapter 13) states, "This amount includes only your regular post-petition payments and **any** fees and charges. It does not include any past unpaid amounts or Pre-Petition Arrearage".

The word "any" implies that this box includes all fees and charges, even though the amount shown does not include past due amounts, which may include fees and charges, pre-petition fees, or fees already paid. This is contradictory.

- For Chapter 7, the the first sentence could be replaced with "This amount includes only your regular monthly payments and fees and charges since your last statement."
- For Chapter 13, it may be preferable to say, "This amount includes only your regular, post-petition payments and your unpaid post-petition fees and charges." In the second sentence, "past" unpaid amounts is ambiguous because it could mean pre- and post-petition amounts, so the sentence could mean that only arrearages are excluded. If the intent is that fees are only included if they were assessed in the most recent month, it would be clearer for the first sentence to read, "This amount includes only your regular, post-petition payments, and your unpaid post-petition fees and charges since your last statement." The second sentence could then be deleted.

Somewhat Inconsistent Statements About Payment Questions

Some of these untitled boxes have statements about trustee payments. "If you have questions about where to send your payment, contact the Trustee or your attorney" and in the Bankruptcy Notice, "If you have any questions about your payments, contact the Trustee or your attorney." A4, A5. These statements are redundant yet somewhat inconsistent. If the message is to contact the Trustee or an attorney, the reasons for doing

so should be completely consistent, and we question the need for redundancy. The second of these statements is more appropriate.

B. Bankruptcy Notice

Opt-Outs

Most, but not all, of the Bankruptcy Notices indicate that consumers may opt out of receiving statements. B2, B3, C1, C2, C3 (Chapter 7) and B4, B5, B6, C4, C5, C6 (Chapter 13).

This is extremely helpful. There is no disadvantage to permitting consumers to opt out of receiving statements because any consumer who wants to receive them can do so. At the same time, monthly statements may be inappropriate in a bankruptcy context.

- In the disclaimer in B2 and B3, the third sentence says the mortgage statement is required by law, but the following sentence says you can stop receiving statements, implying you can do something illegal. It would be more consistent to say, "By law, we must send you these statements unless you opt out of receiving them."
- The statements refer to opting out by writing. It should be permissible to opt out online. If on-line access is available for bankruptcy consumers, it should be permissible to indicate that this option is available, so as not to imply that the writing must be by paper mail, and to be consistent with the E-Signatures In Global and National Commerce Act.[19]
- If the consumer has already opted out of statements before this new regulation takes effect, it should not be necessary for that consumer to opt out again.
- If the consumer has ceased all communications under the Federal Debt Collection Practices Act[20] ("FDCPA"), it should not be necessary to send statements unless the consumer revokes that direction. Note that when the FDCPA applies to

[19] 15 U.S.C. § 7001 provides:
"Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II), with respect to any transaction in or affecting interstate or foreign commerce–
(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form[.]"

[20] FDCPA § 805(c), 15 U.S.C. § 1692c(c) provides:
If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except-
(1) to advise the consumer that the debt collector's further efforts are being terminated;
(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy."

mortgage loans is often unclear, and in these cases servicers may apply it as a precaution.

Bankruptcy Disclaimers

There are several permutations for both Chapter 7 and 13. We strongly encourage the CFPB to allow servicers to continuing drafting bankruptcy disclaimers based on their experience with their customers and without losing safe harbor protections. However, we offer the following comments. The tested disclaimers are set out here for ease of reference.

Chapter 7:

- "Our records reflect that you are presently a debtor in an active bankruptcy case or you previously received a discharge in bankruptcy. This statement is being sent to you for informational and compliance purposes only. It should not be construed as an attempt to collect a debt against you personally." A1.
- "**This statement is for information only. We are not trying to collect a debt against you personally.** Our records show that you recently filed for bankruptcy or you already have a discharge. Although your legal duty to repay the loan may be discharged, we still have a lien on the property and the right to foreclose on the property if the loan is in default." A2.
- "**This statement is for informational purposes only. It is not an attempt to impose personal liability on you.** Our records show that either you are a debtor in bankruptcy or you discharged your mortgage loan in bankruptcy. As such, any payments you choose to make are voluntary. However, the mortgage loan contract may allow foreclosure if the contract's requirements are not met. Please write to us if you do not want to receive these statements anymore." B1.
- "**Our records show that either you are a debtor in bankruptcy or you discharged your mortgage loan in bankruptcy. This statement is for informational and compliance purposes only. By law, we must send it to you. You can choose to stop receiving statements by writing to us at our address below.**" B2, B3.
- "**Our records show that either you are a debtor in bankruptcy or you discharged your mortgage loan in bankruptcy.** We are sending this statement to you for informational and compliance purposes only. It is not an attempt to impose personal liability on you. If you want to stop receiving statements, write to us." C1, C3.
- "**Our records show that either you are a debtor in bankruptcy or you discharged your mortgage loan in bankruptcy.** We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you. Any payments you choose to make are voluntary. If you want to stop receiving statements, write to us." C2.

Chapter 13:

- "Our records reflect that you are presently a debtor in an active bankruptcy case or you previously received a discharge in bankruptcy. This statement is being sent to

you for informational and compliance purposes only. It should not be construed as an attempt to collect a debt against you personally. The information disclosed on the periodic statement may not reflect payments you have made to the Trustee and may not be consistent with the Trustee's records. Please contact the Trustee or your attorney if you have any questions regarding this matter." A3.

- "**This statement is for information only. We are not trying to collect a debt against you personally.** Our records show that you recently filed for bankruptcy or you already have a discharge. Although your legal duty to repay the loan may be discharged, we still have a lien on the property and the right to foreclose on the property if the loan is in default. You should know that the information on this statement may not be up to date. For instance, it may not show payments you already made to the Trustee. If you have any questions about your payments, contact the Trustee or your attorney." A4, A5.
- "**Our records show that either you are a debtor in bankruptcy or you discharged your mortgage loan in bankruptcy. This statement is being sent to you for informational and compliance purposes only. By law, we must send it to you. You can choose to stop receiving statements by writing to us at our address below.** If your bankruptcy plan requires you to send your mortgage payments to the Trustee, you should pay the Trustee directly. Please contact the Trustee or your attorney if you have questions." B4, B5.
- "**Our records show that either you are a debtor in bankruptcy or you discharged your mortgage loan in bankruptcy. This statement is being sent to you for informational and compliance purposes only. It is not an attempt to impose personal liability on you.** However, the mortgage loan contract may allow foreclosure if the contract's requirements are not met. If your bankruptcy plan requires you to send your mortgage payments to a Trustee, you should pay the Trustee directly. Please contact the Trustee or your attorney if you have questions. Please write to us if you do not want to receive these statements anymore." B6.
- "**Our records show that you are a debtor in bankruptcy. This statement is being sent to you for informational and compliance purposes only. It is not an attempt to impose personal liability on you.** If your bankruptcy plan requires you to send your regular monthly mortgage payments to the Trustee, you should pay the Trustee instead of us. Please contact your attorney or the Trustee if you have questions. **If you want to stop receiving statements, write to us.**" C4, C5.
- "**Our records show that you are a debtor in bankruptcy. This statement is being sent to you for informational and compliance purposes only. It is not an attempt to collect a debt against you. Any payments you choose to make are voluntary.** If your bankruptcy plan requires you to send your regular monthly mortgage payments to the Trustee, you should pay the Trustee instead of us. Please contact your attorney or the Trustee if you have questions. **If you want to stop receiving statements, write to us.**" C6.

Comments

- The disclaimer in A3 refers to a statement and to a periodic statement, while the piece of paper is titled Mortgage Statement. In the disclaimer, "the periodic statement" could be "this statement" because it is clear and is more consistent with the other references.
- In A3, in the second sentence, the phrase "being sent to you" adds nothing. This is also included in disclaimers in B4, B5, B6, C4, C5, and C6.
- In A2, A4, and A5, the mention of "recently" filing for bankruptcy may not be accurate, and adds no meaningful information. That word should be deleted.
- In A4 and A5, the statement that the information may not be up to date implies that the servicer's information may not be up to date. This is inaccurate and should be deleted. Perhaps, "This statement does not reflect payments you made to the Trustee that we have not received."
- The disclaimers in B1, C2, and C6 state that any payments you choose to make are voluntary, which is a truism. It might be more meaningful to state that any payments you make are voluntary.
- In C6, the fourth sentence says payments are voluntary, but the next sentence talks of a requirement to send payments. This seems inconsistent. We suggest that it read, "If your bankruptcy plan directs you to send your post-petition payments . . . ."

C. Explanation of Payment Amount

If the final regulation will require a principal-interest breakdown for Chapter 13 statements, the regulation will need to be extremely clear about how servicers must or may calculate that breakdown.

D. Account Information

- We request confirmation that the outstanding principal is the contractual amount.
- We recommend that the rate adjustment and prepayment penalty information can be omitted, at the servicer's discretion, when it does not apply.

E. Transaction Activity

We request confirmation that the descriptions of charges are not established by the regulation, and that abbreviations are permissible if they are clear.

F. Chapter 7 Account History

- Would the statement in C3 that you are late on your payments be omitted if the loan is current?
- C3 includes the number of days delinquent. We do not know what use this information could be, and it could be construed as inappropriate debt collection. In testing, participants were mixed on whether this was useful, and they were not clear why it was included or what they would use it for.[21] We recommend omitting it.
- Each of the tested statements has a reference in this box to the back of the statement. If the statements are electronic, this should be replaced with "below" or perhaps with a hyperlink.

G. Important Messages

Some statements have no Important Messages box. If no box is required, would a box be optional?

The Chapter 7 Important Messages boxes are all the same, but the Chapter 13 boxes differ. The Chapter 13 Important Messages box covers up to three topics, set out below for ease of reference, and separated by topic.

Payments to Trustee

- "This statement shows payments we've received from you and the Trustee. It may not show payments you recently sent to the Trustee, and it may not be consistent with the Trustee's records. Please contact the Trustee or your attorney if you have questions." B4, B5, B6.
- "This statement may not show recent payments you sent to the Trustee that the Trustee has not yet forwarded to us. Please contact your attorney or the Trustee if you have questions." C4, C5, C6.

Partial Payments

- "***Partial Payments:** Any partial payments listed here are not applied to your mortgage, but instead are held in a separate suspense account. Once we receive enough funds to equal a full monthly payment, we will apply those funds your mortgage." B4.
- "**"Past Payments Breakdown"** shows how we applied all funds we've received from you or the Trustee to your mortgage. Any partial payments listed here are not applied to your mortgage, but instead are held in a separate suspense account. Once we receive enough funds to equal a full monthly payment, we will apply those funds to your mortgage." B5, B6.

[21] Report at 56.

- "***Partial Payments:** Any partial payments listed here are not applied to your mortgage, but instead are held in one or more separate suspense accounts. Once we receive funds equal to a full monthly payment, we will apply those funds to your mortgage." C4, C5. C6 is the same but in the second sentence, replaces "those" with "the".

Pre-Bankruptcy Debt (Arrearage)

- "**"Pre-Bankruptcy Debt (Arrearage)"** shows the payments we've received from the Trustee that are reducing the amount of your pre-petition or pre-bankruptcy debt (arrearage), and the current outstanding balance of that debt." B5, B6.
- C5 and C6 have a related statement in the Pre-Petition Arrearage box:
  - "This box shows amounts that were past due when you filed for bankruptcy. It may also include other allowed amounts. The Trustee is sending us the payments shown here." C5.
  - "This box shows amounts that were past due when you filed for bankruptcy. It may also include other allowed amounts on your mortgage loan. The Trustee is sending us the payments shown here. These are separate from your regular monthly mortgage payment." C6.

Comments

Payments to Trustee

- The statement that this does not show payments you "recently" sent the Trustee, B4, B5, B6, may be inconsistent with what the borrower considers recent. The relevant fact is not how long ago the debtor paid the trustee, but whether the servicer received the payment from the trustee. The word "recently" should be deleted.
- The statement that this "may" not show payments to the trustee that the servicer has not received from the trustee, B4, B5, B6, C4, C5, and C6, is not fully accurate. It does not show them. "May not" should be replaced with "does not".
- A concern with these two statements is that they could give the impression that servicers have some knowledge about payments to the trustee that the trustee has not yet forwarded to the servicer. If the servicer tells a consumer a payment to a trustee was recent, that implies the servicer may know of the payment. If a statement "may" not include some payments to the trustee that the servicer has not received, that implies that it may include others that the servicer has not received. Bankruptcy statements should not give this inaccurate impression.

Partial Payments

- The statement that "we applied all funds" received to your mortgage, B5, B6, contradicts the following sentence, stating that some payments listed here are not applied. The word "all" should be deleted.
- The statements contain the following similar statements that could be clearer. The emphasis is added to show the differences:

  - "Once we receive **enough** funds to equal a full monthly payment, we will apply **those** funds to your mortgage." B4, B5, B6.
  - "Once we receive funds equal to a full monthly payment, we will apply **those** funds your mortgage." C4, C5.
  - "Once we receive funds to equal a full monthly payment, we will apply **the** funds to your mortgage." C6.

  Perhaps, "Once we receive enough ~~funds~~ **partial payments** to equal a full **contractual** monthly payment, we will apply those ~~funds~~ **partial payments** to your mortgage." Or, in the Chapter 7 statements, "***Partial Payments:** Any partial payments that you make ~~are~~ **may** not **be immediately** applied to your mortgage, but instead ~~are~~ **may be** held in a separate suspense account. If you pay the balance of a ~~partial~~ **contractual** payment, the funds will then be applied to your mortgage."
- The mention of possible multiple suspense accounts, as in C4, C5, and C6, is too much detail.

Pre-Bankruptcy Debt (Arrearage)
The statement that arrearage payments received "are reducing" (in the present tense) the arrearage, B5 and B6, should be in the past tense. The present tense may imply that the past payments are continuing to reduce the arrearage, even if there have been no more recent arrearage payments. The word "reduced" would be clearer.

H. Coupon Directions

- Some coupons have no directions and some have payment directions. Directions should be optional.
- Coupons should be optional.
- The statement in A1 to detach the coupon does not accommodate electronic payments. The statement should be optional.
- The statement in A1 (Chapter 7) says "If you are currently a party in a bankruptcy case and you choose to make a voluntary payment, detach and return bottom remittance portion with your payment. . . ."
  - This may imply that after a discharge, this statement does not apply because the case is not currently pending.
  - Choosing to make a voluntary payment is a truism.

  Perhaps this could say, "If you choose to make a payment . . . ."

I. Late Fees

Most of the statements do not indicate the amount or date of a late fee for the next payment due date. Many servicers simply do not assess late charges to bankruptcy debtors. It should therefore be permissible not to indicate that there could be a late charge, its future assessment date, or its amount. However, if a CFPB regulation makes it impermissible to indicate a future late fee assessment date, that would create a conflict

with a longstanding OCC regulation (originally a Federal Home Loan Bank Board regulation).[22]

Recommendation
We recommend that information about future late fees may be omitted from statements if the servicer will not assess them on late payments.

V. Conclusion

We appreciate the CFPB's outreach to servicers to learn about the feasibility of bankruptcy statement requirements. If we can provide any further information, or if you would like to discuss our comments in further detail, please let us know. We would be very pleased to provide any further information you may need. We urge the CFPB to provide servicers at least 24 months to implement a new bankruptcy statement requirement.

Sincerely,

Consumer Mortgage Coalition
Credit Union National Association
National Association of Federal Credit Unions

[22] 12 C.F.R. § 160.33 provides:

> "A Federal savings association may include in a home loan contract a provision authorizing the imposition of a late charge with respect to the payment of any delinquent periodic payment. With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no late charge, regardless of form, shall be assessed or collected by a Federal savings association, unless any billing, coupon, or notice the Federal savings association may provide regarding installment payments due on the loan discloses the date after which the charge may be assessed. A Federal savings association may not impose a late charge more than one time for late payment of the same installment, and any installment payment made by the borrower shall be applied to the longest outstanding installment due. A Federal savings association shall not assess a late charge as to any payment received by it within fifteen days after the due date of such payment. No form of such late charge permitted by this paragraph shall be considered as interest to the Federal savings association and the Federal savings association shall not deduct late charges from the regular periodic installment payments on the loan, but must collect them as such from the borrower.