September 9, 2024

Comment Intake – Mortgage Servicing
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X [Docket No. CFPB-2024-0024]

To Whom It May Concern:

The Mortgage Bankers Association[1] (MBA) welcomes the opportunity to comment on the Consumer Financial Protection Bureau's (the Bureau) notice of proposed rulemaking (NPRM) *Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties (*the Proposal). The Proposal significantly changes the mortgage servicing provisions of Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), and discusses new possible obligations for serving borrowers with limited English proficiency. While we appreciate the Bureau's decision to modernize Regulation X's loss mitigation framework to align with existing practices, the Bureau should amend the Proposal to motivate borrowers to contact their servicers and pursue loss mitigation assistance as early in the delinquency as possible. Incentives for borrowers to act quickly will result in quality engagement that will enable mortgage servicers to achieve the shared goal of producing successful outcomes for borrowers experiencing financial hardship.

Summary of Recommendations

To address the challenges with the Proposal and create a more balanced framework that produces successful borrower outcomes, we recommend the Bureau make the following improvements:

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 275,000 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 to 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 2,000 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

1. Motivate borrower engagement in the loss mitigation process and provide clear and reasonable parameters for servicers to determine when dual tracking protections begin and end under the new "loss mitigation review cycle."

2. Reinstate the "one review" framework by preserving Regulation X's existing "duplicative requests" standard for each delinquency cycle.

3. Eliminate the foreclosure fee prohibition and recognize that certain costs can be passed to borrowers.

4. Provide appropriate lead time and exceptions to halting the foreclosure process.

5. Simplify all notice requirements and encourage borrowers to contact their servicers to discuss details about their loss mitigation review and available options.

6. Conduct a separate rulemaking with proposed rule text and appropriate cost-benefit analysis to expand language access to borrowers with limited English proficiency.

As a separate matter, the Bureau must clearly state that the final rule is effective and applies for any new requests for assistance after the rule's effective date and that servicers are not expected to comply with the new rules for loss mitigation reviews currently in process/in-flight.

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I. General Comments

The Bureau proposes significant changes to Regulation X by eliminating the procedural loss mitigation application framework. This move is designed to create flexibility for servicers to assist delinquent borrowers in the loss mitigation evaluation process. In its place, the Bureau introduces the "loss mitigation review cycle" and a "request for loss mitigation assistance." These concepts are intended to allow distressed borrowers to receive timely assistance immediately upon request (also known as "the hand-raise" concept). This change modifies the current dual-tracking protections by applying them earlier in the default process, adds a new prohibition against servicers' recovery of servicing fees and costs, and introduces a narrowly defined prohibition against advancing the foreclosure process during a loss mitigation review cycle.

The Bureau also includes two very consequential proposals. One of these changes is the sweeping adjustments to the early intervention and loss mitigation determination notices to include the significant expansion of detailed information to be provided to borrowers, including the recitation of investor-specific requirements. Finally, the Bureau also considers expanding specific early intervention and loss mitigation determination communications in languages other than English to assist borrowers with limited English proficiency. [2]

[2] The Bureau also requests comment regarding certain approaches it can take to ensure servicers are furnishing accurate and consistent credit reporting information for borrowers' loss mitigation reviews.

a. MBA Welcomes Regulation X Modernization

MBA has been a vocal and longstanding advocate for modernizing the loss mitigation rules under Regulation X. [3] MBA previously requested rulemaking to amend Regulation X, given the evolution of streamlined loss mitigation solutions.[4] Implementing a durable regulatory framework gives distressed borrowers access through their servicer to efficient and effective loss mitigation solutions offered by investors and guarantors to preserve affordable homeownership.

We welcome several improvements to the Regulation X framework, including removing prescriptive requirements like the "anti-evasion" rule that will provide servicers with the flexibility to assist borrowers more quickly. We also appreciate the Bureau's removal of an unnecessary early intervention notice that created confusion when borrowers were performing under a forbearance agreement. MBA's past comments summarize the issues and reasons for supporting modernization:

> We agree that loss mitigation practices have significantly evolved since the Bureau first implemented the mortgage servicing rules in 2014, and *the Bureau is wise to propose changes.* . . The Bureau must remove unnecessary barriers that impede the borrower's loss mitigation experience and maintain the current focus on procedural rights . . . Regulation X was crafted to ensure that servicers provided sufficient protections to borrowers to avoid foreclosure and worked for those borrowers that actively engaged with their servicer. That said, modification offerings, the loss mitigation toolbox, and technology have advanced significantly over the years to enable streamlined solutions and long-term forbearance plans, neither of which were initially contemplated by the Bureau. *It is, therefore, appropriate* to amend Regulation X's rigid standards to reflect evolving loss mitigation practices better, minimize borrower confusion, and reduce servicer costs and operational risks.[5]

We also appreciate the Bureau's efforts to implement the lessons learned from the COVID-19 pandemic to achieve essential policy objectives and preserve many of the COVID-19 loss mitigation flexibilities available by investors and guarantors to mortgage servicers to assist borrowers. For instance, while we do not agree with the way the Bureau has proposed it, we support the application of foreclosure protections earlier in the default process. The Bureau's continued deference to investor guidelines on the availability of and eligibility for loss mitigation options is also appropriate as both a policy choice and legal matter. However, despite these positive changes, the Proposal's broad and undefined standards implementing the loss mitigation review cycle and the corresponding dual tracking prohibitions do not achieve the desired policy objectives to simplify and streamline the loss mitigation process.

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[3] Mortgage Bankers Association, Request to Conduct Rulemaking on Regulation X Early Intervention Requirements and Loss Mitigation Procedures (May 5, 2023), available at https://www.consumerfinance.gov/rules-policy/petitions-rulemaking/mortgage-bankers-association/
[4] *Id.*
[5] Mortgage Bankers Association, Re: Upcoming Rulemaking to Modernize the Loss Mitigation Rules of Regulation X (Dec. 6, 2023), available at https://www.mba.org/docs/default-source/policy/mba-regulation-x_early-intervention-and-loss-mitigation-letter_december-2023.pdf?sfvrsn=94d9a5d0_1.

b. The Proposal Misaligns Loss Mitigation Incentives

To appropriately implement the lessons learned from the COVID-19 pandemic, there needs to be an alignment of incentives for the loss mitigation process to work for both mortgage servicers and borrowers.[6] The loss mitigation review cycle concept omits essential requirements to motivate and obligate *borrowers* to engage with their servicers and with the loss mitigation assistance process as quickly as possible. Instead, lax standards require dual tracking protections and the proposed fee prohibition to be given automatically upon a borrower's request.

The Bureau argues that, in addition to modernization, mortgage servicers need strong, new incentives to quickly complete accurate loss mitigation reviews to prevent unnecessary consumer harm. This argument is unsupported by evidence to conclude these "incentives" will result in better loss mitigation outcomes for borrowers, particularly given that foreclosure rates are at historically low levels.[7] Indeed, the Bureau does not identify in the loss mitigation review process any record of servicers' systemic failure to engage borrowers to support its concern, but instead implements a proposed fee prohibition that is strictly punitive to servicers and investors.[8]

To that end, one point must be made abundantly clear: mortgage servicers do not profit from the execution of the foreclosure process against distressed borrowers. While home price appreciation has been well documented in recent years, the foreclosure process remains lengthy, costly, and burdensome, and remains the option of last resort.[9] Moreover, existing authorities – statutory, regulatory, and investor contracts – require that mortgage servicers owe a duty of care to distressed borrowers.

The Bureau conflates providing the opportunity to pause foreclosure earlier in the loss mitigation process with a borrower's efforts to begin and complete the loss mitigation review process. We are concerned that implementing the Bureau's proposal would create perverse incentives for borrowers and adversely affect the mortgage markets. For the loss mitigation process to work, it is the *borrower* who must engage with the servicer and be an active participant in the loss mitigation process by submitting information required for an evaluation and executing any necessary documents to implement a loss mitigation option.

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[6] MBA/ABA's joint statement in response to the CFPB's Mortgage Servicing Proposal, available at https://www.mba.org/news-and-research/newsroom/news/2024/07/10/MBA-ABA-Respond-to-CFPBs-Mortgage-Servicing-Proposal (Summarizing the success of servicers during the COVID-19 pandemic, the statement highlighted "Servicers have helped more than 8 million families stay in their homes since the beginning of the COVID-19 pandemic while adapting to new and rapidly changing loss mitigation programs implemented by government agencies.")

[7] See ICE Mortgage Monitor Report, at Page 5 (September 2024), available at https://static.icemortgagetechnology.com/pdf/september-2024-mortgage-monitor-report.pdf (showing historical foreclosure starts and inventory)

[8] Beyond modernization, the Bureau does not highlight a policy concern or cite its complaint data base to highlight a growing consumer harm to warrant the need the for the loss mitigation review cycle concept or its associated prohibitions.

[9] For example, see average Fannie Mae's Foreclosure Time Frames and Compensatory Fee Allowable Delays Exhibit; available at https://singlefamily.fanniemae.com/media/6726/display

The Proposal does not motivate or promote a borrower's engagement with their servicer and instead permits and even encourages borrowers – however inadvertently -- to fruitlessly prolong the loss mitigation process and their delinquency rather than reach a timely outcome. As noted in more detail below, prolonged loss mitigation only erodes a borrower's equity position and diminishes incentives for sustainable homeownership.

c. The Proposal Hurts Borrowers; Weakens Mortgage Industry

Applying protections when a borrower raises their hand creates several unintended but obvious consequences that harm borrowers and weakens the mortgage industry. In short, the Proposal effectively creates an automatic and extended forbearance with no eligibility requirements and the potential for indefinite foreclosure holds. The harms incurred by doing so are well known. Extending a borrower's delinquency, without a review of the borrower's financial circumstances or engagement with the loss mitigation process, increases their arrearages, making it more difficult for a borrower to reinstate their past due mortgage payment and erodes their home equity. Such a policy does not put borrowers in a stronger financial position, which the industry warned against in its response to the 2022 RFI on Mortgage Refinances and Forbearance. [10]

Moreover, the Bureau's analysis does not thoughtfully consider the potential impact on borrowers and the mortgage markets. The assumption by the Bureau that providing foreclosure protections earlier leads to more successful loss mitigation outcomes for borrowers is unfounded. The Bureau is unable to quantify the number of averted foreclosures or cost savings to the distressed borrower, if any, with this new proposed loss mitigation review cycle.

The health of the housing finance ecosystem relies on the ability of mortgage servicers to enforce the mortgage lien when necessary. Creating undue burdens on the ability of lenders to enforce their security interest ultimately will drive up mortgage costs for borrowers. It also exacerbates affordability issues. The shortage of housing supply in the country is also well known. While mortgage servicers exhaust all efforts to help borrowers retain their homes, foreclosure is a necessary last resort that preserves future access to credit, creates new supply and protects neighborhoods from blight when the process timeline is reasonable.

The Bureau has not proposed a viable framework that simplifies and streamlines the loss mitigation process.[11] To achieve such a framework the Bureau must preserve essential

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[10] Mortgage Bankers Association, Re: CFPB Request for Information Regarding Mortgage Refinances and Forbearances (Nov. 28, 2022), available at https://www.mba.org/docs/default-source/residential-policy-letters/cfpb-rfi_mba-signed-letter_final_11.28.22.pdf?sfvrsn=d2174ecb_1.

[11] While this comment will only touch on the Bureau's authority to issue such sweeping proposals in a few instances, the Bureau should also carefully consider its statutory authority under RESPA and Dodd-Frank, relevant developments in the law and whether – taken together – they would support a sweeping overhaul of the loss mitigation rules. *See* Bradley Arant Boult Cummings LLP, Re: Docket No. CFPB-2024-0024 (RIN 3170-AB04); Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X (Aug. 30, 2024), available at https://www.regulations.gov/comment/CFPB-2024-0024-0030.

elements from the existing rules that correctly require borrowers to meaningfully engage with their mortgage servicer to complete the loss mitigation process. Successful modernization requires the Bureau to advance well-established principles that have guided previous improvements to the current framework. The Proposal only partly accomplishes this objective, and as a result, further improvements are necessary to implement a sustainable framework that allows mortgage servicers to respond to the next crisis. [12] To recall these principles and where this proposal misses the mark:

Regulation X should balance the legitimate needs of borrowers and the impact that regulation could have on credit access and mortgage assistance.

The Bureau's regulations should represent a careful balance between protecting distressed borrowers and the reality that regulatory costs and prolonged foreclosure processes affect access to homeownership. Mortgage loan pricing reflects the regulatory costs and risks of lending *and* servicing. As regulatory burden increases, the cost of credit increases, negatively affecting access to homeownership. Underlying regulatory risks related to loss mitigation requirements could cause servicers and investors (especially those interested in purchasing Private Label Securities or growing that market) to participate in fewer loss mitigation programs or refrain from participating in the market altogether. Unnecessary restrictions and risks discourage the industry from developing innovative loss mitigation solutions to assist distressed borrowers. For the reasons outlined below, this proposal falls short of achieving this balance.

Borrower contact and consent are fundamental requirements for successful loss mitigation.

The Bureau's rules must encourage borrowers not only to contact their mortgage servicer but to engage in the loss mitigation process. Borrowers engaged with their servicer are informed on how loss mitigation works and the expectations for performance, including when a borrower receives a forbearance and transitions to a permanent solution. These rules should be designed to ensure that borrowers understand the benefits of contacting their servicer in a timely manner and remaining meaningfully engaged in ongoing dialogue, as well as the adverse consequences of not doing so. The Proposal rule fails to encourage borrowers to engage with their servicer and thus meet the shared objective of designing a successful framework.

II. Specific Comments

a. Loss Mitigation and Foreclosure Procedures

[12] Mortgage Bankers Association, Re: Upcoming Rulemaking to Modernize the Loss Mitigation Rules of Regulation X (Dec. 6, 2023), available at https://www.mba.org/docs/default-source/policy/mba-regulation-x_early-intervention-and-loss-mitigation-letter_december-2023.pdf?sfvrsn=94d9a5d0_1.

Regulation X's existing loss mitigation application framework establishes that a servicer has 30 days to evaluate a borrower for all loss mitigation options available upon receipt of a complete application.[13] A borrower receives foreclosure protections upon receipt of a facially complete or complete application. The removal of the application framework is a monumental shift in the rules governing the loss mitigation process and the relationship between a mortgage servicer and a borrower seeking assistance. The proposed loss mitigation review cycle framework swings the pendulum completely in favor of flexibility at the cost of certainty and incentivized borrower engagement. The better course is for the Bureau to find the middle ground.

To find middle ground, we recommend the Bureau:

i. **Provide clear parameters to determine when dual tracking protections begin and end under the loss mitigation review cycle.**

The Bureau must create reasonable and well-defined triggers for servicers to determine when dual tracking protections apply under the loss mitigation review cycle. As proposed, the loss mitigation review cycle begins under proposed § 1024.31 if a borrower requests loss mitigation assistance at least 37 days before a foreclosure sale and ends once the borrower is current or when one of two procedural safeguards under proposed § 1024.41(f)(2)(i) or (ii) is satisfied. Those safeguards state that a servicer may proceed with the foreclosure process if no loss mitigation options remain available or the borrower has been unresponsive for 90 days.[14] Despite these safeguards, the proposed framework would allow borrowers to extend the loss mitigation review cycle and their delinquency indefinitely. The proposal is unclear regarding when "no loss mitigation options remain" for a borrower and sets an extremely low bar for what constitutes a "responsive" borrower.

As proposed, the loss mitigation review cycle is an open and undefined period that begins instantly upon a borrower's request following default. The Bureau must address the ambiguity of this proposed framework and the operational dilemmas it creates for mortgage servicers, including documenting compliance under § 1024.38. Clear parameters are also necessary for servicers to set proper expectations with borrowers regarding foreclosure protections.

To better define those parameters, we urge the Bureau to ***begin*** the loss mitigation review cycle upon a servicers receipt of *an affirmative* request to commence a loss mitigation review. At the other end of the process, we reiterate MBA's previous position that dual-tracking protections should terminate at specific milestones, such as:

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[13] 12 CFR § 1024.41(c)(1).
[14] 12 C.F.R. § 1024.41(f)(2)(i) - § 1024.41(f)(2)(ii).

1) the borrower's failure to provide sufficient information to allow the servicer to make a loss mitigation determination within 30 days of the servicer requesting such information;[15]

2) the borrower has been offered a loss mitigation option but has affirmatively declined the offer or has not accepted it within the required timeframe; or

3) the borrower has been reviewed and denied for all loss mitigation options and any applicable appeal period has expired, or

4) the borrower indicated they are not interested in being reviewed for loss mitigation.

We also encourage the Bureau to allow for the end of protections for abandoned properties.[16]

Delaying protections until a borrower has affirmatively requested to be evaluated for loss mitigation and ending protection at the milestones proposed above would strongly encourage borrowers to meaningfully engage with their servicer and avoid prolonged or indefinite delinquencies.

Additional details and specific policy recommendations follow concerning loss mitigation and foreclosure procedures:

1. Request for Loss Mitigation Assistance

To start, the Bureau must revise the proposed definition of a request for loss mitigation assistance under § 1024.31, which is proposed to be any communication whereby a borrower asks for mortgage relief. Specifically, a request for loss mitigation assistance should be an *affirmative request* by the borrower to be reviewed for loss mitigation options offered by the servicer and accompanied by sufficient information that permits the servicer to initiate a loss mitigation review. To ensure meaningful engagement between borrowers and servicers in resolving a borrower's delinquency, the Bureau should align its standards with existing industry standards – such as Fannie Mae or Freddie Mac's "Qualified Right Party Contact" - which require a borrower to express a commitment to resolving their financial hardship. Protections should begin once a borrower expresses and demonstrates their intent to complete the loss mitigation process.

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[15] *See* Section II.a.i.C. A loss mitigation review cycle can be extended up to an additional 30 days if the borrower re-establishes contact with their servicer and provides the necessary information that allows a servicer to make a loss mitigation determination. However, protections should not apply.
[16] The Bureau should consider Freddie Mac's standard definition for abandoned properties, which is "real property to which the owner has voluntarily and intentionally relinquished possession, claim and control, or real property defined as abandoned property by applicable laws. Conditions that may lead to abandonment include vacancy, waste, deterioration, lack of utilities or Delinquency ((FHLMC Guide Section 8403.2)). See also Mortgage Bankers Association, New York Mortgage Bankers Association, Principles to Expedite the Foreclosure Process for Vacant and Abandoned Properties (2015), available at https://www.mba.org/industry-resources/resource/joint-letter-principles-to-expedite-the-foreclosure-process-for-vacant-and-abandoned-properties-x94622.

The Bureau's broad proposal to begin the loss mitigation review cycle immediately upon request is fraught with several challenges. Notably, the Bureau's proposed standard explicitly states that a request must be broadly construed and applies to any communication from a borrower – in part - that expresses interest in pursuing loss mitigation. Expressing interest in pursuing loss mitigation is undefined and inadequate as it does not require a borrower to express the intent or commitment to resolving a temporary or permanent hardship.

The Bureau must provide clear examples to qualify or further define an expression of interest in the Official Commentary to Regulation X. Since expressions are typically verbal, it is critical to clarify what the Bureau considers as acceptable written communication and its expectations of servicers when they receive random documentation submissions from borrowers.

The lack of specific guidance regarding "any communication" only contributes to the uncertainty when determining whether a borrower has submitted a request that triggers foreclosure protections. A borrower might send in paystubs without any accompanying communication, leaving the servicer unsure if that is a request for loss mitigation assistance or just a random document submission. Alternatively, a borrower might send in a payment that is less than the scheduled monthly contractual amount required, leaving the servicer to wonder if this is a request for help.

Another challenge is the Bureau's view that servicers should presume that any contact from a delinquent borrower is a request for loss mitigation assistance unless the borrower expresses some other intention. Put simply, this creates additional uncertainty for servicers regarding when the loss mitigation review cycle has begun. Delinquent borrowers may have a litany of reasons why they would contact their mortgage servicer, even if they are uninterested in loss mitigation (i.e., questions regarding escrow, insurance claims, etc.). A borrower may be delinquent for several reasons but may not need loss mitigation assistance.

To resolve these challenges, the Bureau should also acknowledge that servicers may ask borrowers whether they want to be reviewed for loss mitigation assistance and may rely upon the borrower's answer to determine whether a request has been made.[17] If a borrower wants to learn about the loss mitigation process and the options that may be available but is not yet ready to be reviewed for loss mitigation, this should not constitute a request for loss mitigation assistance. Given the loss mitigation review cycle's importance for borrowers and servicers alike, it is critical that servicers have clear and unambiguous guidelines for when

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[17] While not the focus of our comments here, the Bureau must refine the definition and limit the channel through which a Request for Loss Mitigation assistance can be made. Language such as "any usual and customary channel" is too broad and could, for example, be interpreted to include any miscellaneous servicing-related function, such as a PO Box, fax number specified for insurance information, or request conveyed on the 2nd page of a period statement. Servicers should be able to designate a particular channel for requests to be made, such as through phone, email, or website portals. We urge the Bureau to generally align with existing definitions in the Notice of Error and Information Requests (§ 1024.35 and .36 respectively).

the cycle and associated protections begin. If there is a clear standard to follow, servicers will not need to construe anything broadly or make presumptions about specific conversations with borrowers.

2. Foreclosure Procedural Safeguards

The Bureau must provide concrete milestones to end dual tracking protections under the loss mitigation review cycle. For the reasons below, we urge the Bureau to adopt reasonable loss mitigation review cycle exit points. As proposed, servicers often may not be able to consistently and reliably satisfy either safeguard, rendering the procedural safeguards unworkable.

a. No remaining loss mitigation options

The Bureau proposes several elements servicers must achieve to proceed with foreclosure. As proposed, § 1024.41(f)(2)(i) would provide that the servicer must have reviewed the borrower for loss mitigation and if no available loss mitigation option remains, the servicer must have sent the borrowers all notices required under § 1024.41(c)), if applicable. The borrower also must not have requested any appeal within the applicable time period or, if applicable, all of the borrower's appeals have been denied. Yet, the first element – that the servicer has reviewed the borrower for loss mitigation and "no available loss mitigation option remains" – cannot be consistently applied. Compliance with this safeguard is compounded by the Bureau's attempt at providing flexibility by adopting the sequential review concept. It is rare for there to be scenarios when a loan’s investor will no longer consider any loss mitigation options under any circumstances.

The Bureau must provide the necessary clarity to define what it means for a loss mitigation option to remain available. As an initial matter, certain necessary clarifications are not provided in the regulatory text or Official Commentary but only in the Preamble.[18] Although the Preamble to the NPRM indicates that a loss mitigation option would not be available if "the borrower affirmatively opts out of review for that option," the regulatory text must be clear and explicit that a borrower who affirmatively opts out of the loss mitigation review process has ended any potential loss mitigation review cycle. The ability for a borrower who communicates their intention to opt out of a review for home retention or non-retention options needs to be clearly stated. A borrower should be able to opt out of a non-retention review if they communicate that they would like to retain their home.

Importantly, several of today's loss mitigation options always "remain" available. For example, a borrower with a GSE loan could perpetually be eligible for a Flex Modification, a short sale, or a deed-in-lieu under existing guidelines. The Preamble also explicitly notes that "investor guidelines, …will continue to determine whether any loss mitigation options are available and whether the borrower qualifies for a given option." While we appreciate the Bureau's deference to investor guidelines, investor/agency loss mitigation standards are

[18] Accordingly, an option is not available if 1) the borrower affirmatively opts out of review for that option; 2) the servicer offers the borrower the option and the borrower rejects it; or 3) the servicer finds the borrower ineligible for the option.

often undefined. Therefore, once the loss mitigation review cycle begins, in many cases, it cannot definitively end.

Further, while investor guidelines and regulations consistently provide borrower eligibility and qualifying criteria, not all investors have clearly defined denial ineligibility points for their products, most notably the Government-sponsored enterprises (Fannie Mae and Freddie Mac) and the government agencies. For instance, under the Department of Veterans Affairs' (VA) loss mitigation waterfall, VA loan technicians retain absolute discretion in approving a borrower for a loss mitigation option, even if the borrower doesn't otherwise qualify.[19] Likewise, Federal Housing Administration's (FHA) COVID-19 Recovery Modification – which may become permanent guidance - allows borrowers to be re-reviewed for previously unavailable options.

The burden, therefore, will be on investors/insurers to implement bright-line parameters that determine when loss mitigation is or is not available. The importance of clear parameters cannot be overstated. Such parameters may negatively impact borrowers eligible for loss mitigation review under existing investor/insurer waterfalls but who may be excluded from loss mitigation under waterfalls revised to address the proposed procedural safeguards-based framework. Further, given the potential for indefinite foreclosure holds, it may benefit investors/insurers to establish waterfalls that require servicers to review borrowers for all options simultaneously and render the borrower ineligible for all remaining options. While investors could address these issues by introducing eligibility cut-offs for certain products or requiring a simultaneous review for all available products, doing so would have the opposite effect of the stated purpose of the proposed rule: to provide added flexibility in the loss mitigation process and prevent avoidable foreclosure.

b. Unresponsive Borrowers

Similarly, the Bureau's 90-day "unresponsive borrower" standard could inadvertently encourage borrowers to remain unengaged with their servicer or only remain engaged enough to prolong the foreclosure process and associated fee protections indefinitely. Proposed § 1024.41(f)(ii) states that "a servicer may proceed with foreclosure if the servicer has regularly taken steps to identify and obtain any information and documents necessary from the borrower to determine which loss mitigation options, if any, it will offer to the borrower, and, if the servicer has made a loss mitigation determination, has regularly taken steps to reach the borrower regarding that determination, but the borrower has not communicated with the servicer for at least 90 days." This vague 90-day standard, coupled with broad foreclosure and fee protections could exacerbate borrower disengagement.

There are two issues the Bureau must address. First, the Bureau must provide clear guidelines that servicers can operationalize and monitor to meet the requirements under the proposed safeguard. Specifically, the NPRM's Official Commentary broadly defines "communication" and "regular contact." Like the Bureau's definition of a request for loss

[19] Another extreme but realistic example of a borrower's extended delinquency under the loss mitigation review cycle is the Veterans Affairs Servicing Purchase program that qualifies borrowers with up to 60 missed payments.

mitigation assistance, a "communication" in and of itself is not an affirmative action by the borrower that indicates the intent to complete the loss mitigation review process. Instead, a borrower can "communicate" with the servicer through any means available and for any reason about the mortgage loan and the servicer will not be able to satisfy the unresponsive borrower safeguard because of that communication. This creates the possibility for abuse.

Likewise, a servicer's responsibility to have "regularly taken steps" to obtain information and documents to make a loss mitigation determination is also undefined. The Preamble notes that the new standard replaces a servicer's existing reasonable diligence standard; however, the NPRM's Official Commentary defining "Regular Contact" only requires servicers to communicate the borrower's loss mitigation review status and the information necessary to decide. [20] The Bureau does not qualify or quantify the specific steps. The Bureau should do so, such as two separate and documented attempts to contact the borrower.[21]

It is crucial to note that the Bureau's underlying assumption that servicers are not engaged with borrowers once a loss mitigation review cycle begins is inaccurate and unsupported. This assumption overlooks the fact that the current rules mandate servicers to promptly and frequently communicate with borrowers about the status of their loss mitigation application. Under the proposed framework, servicers would still be required to regularly take steps to identify and obtain information necessary to make a loss mitigation determination.

Altogether, there is no motivation for a borrower to remain sufficiently engaged with their servicer once the loss mitigation review cycle begins to allow the servicer to determine their eligibility for a loss mitigation option. As long as there are loss mitigation options for which the borrower may be eligible and the borrower contacts the servicer once every 90 days, foreclosure and fee protections would remain in place indefinitely, with no borrower determination to resolve the delinquency. A framework that deters prompt and meaningful borrower engagement prolongs borrower delinquencies, eventually rendering borrowers ineligible for some or all loss mitigation home retention mitigation options otherwise available to them.

Under the proposed 90-day rule, borrowers are given significant leeway to delay the foreclosure process. This potential for delay, coupled with the Bureau's prohibition against advancing the foreclosure process, puts servicers at risk of incurring penalties for missing applicable foreclosure deadlines. As noted above, The Bureau must reinforce expectations with borrowers by ending the loss mitigation review cycle after 30 days if the borrower does not provide sufficient information for a servicer to make a loss mitigation determination.

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[20] The Bureau continues to assert that servicers determine the required documents and information necessary for a loss mitigation review. This is incorrect. Investors set the criteria for the loss mitigation options available to borrowers; servicers provide those options to borrowers.

[21] Proposed FHA Mortgagee Letter, *Modernization of Engagement with Borrowers in Default,* defines a “reasonable effort” as, at a minimum, two Verifiable Attempts to arrange the Loss Mitigation Consultation using different methods.

The Bureau should close these gaps and recognize that servicers face additional penalties under investor/insurer rules for failing to make good faith efforts to establish ongoing contact with borrowers to help with their delinquencies.

ii. Preserve the "One Review" Framework

In addition to providing reasonable, concrete milestones for protections to begin and end, a critical improvement to the Proposal is to require that a borrower only receive one loss mitigation review cycle per delinquency. The proposed rule is unclear regarding a borrower's rights for a subsequent loss mitigation review cycle. Because of this uncertainty, the proposed framework would allow borrowers to enter a new loss mitigation review cycle any time they request loss mitigation assistance, regardless of whether the servicer previously reviewed the borrower for loss mitigation. The proposal would also allow the borrower to remain in a loss mitigation review cycle if any loss mitigation option is potentially available (which could be indefinitely) and the borrower contacts the servicer once every 90 days.

The Bureau must eliminate potential for a never-ending cycle by limiting the protections to one-loss mitigation review for all available options by the servicer. Of course, borrowers can be re-reviewed for a loss mitigation option, subject to investor/insurer requirements, but protections should not apply for subsequent reviews.

iii. Eliminate the Unauthorized Fee Prohibition

The Bureau must eliminate proposed § 1024.41(f)(3), which prohibits a servicer from recovering most fees and costs during the loss mitigation review cycle. A restriction that "*during* a loss mitigation review cycle, no fees beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract shall accrue on the borrower's account" is punitive to servicers and investors.[22] More concerning is the Bureau's lack of authority to pursue its fee prohibition and its efforts to inhibit a servicer's contractual right to collect fees.

The Proposal fails to categorize fees appropriately or provide an operationally sound compliance path for several reasons. The lack of specificity and operational detail of the Proposal is cause for concern, since a loss mitigation review cycle can continue indefinitely, or begin and end repeatedly. That is, servicers would need to implement protections off/on repeatedly.[23]

First, the Proposal does not define what "accrue" means. The assumption might be that the Bureau's prohibition applies to the accrual of late fees.. However, the Preamble to the Proposal goes substantially further, stating that "[t]he proposed fee protection would be broad, and would restrict the accrual of interest, penalties, and fees during the loss

[22] Proposed § 1024.41(f)(3)
[23] Like the foreclosure prohibition, servicers cannot implement a 'fee hold' instantly following a borrower's request for assistance. Servicers must be given reasonable time to communicate with their teams and foreclosure counsel.

mitigation review cycle."[24] Such an expansive view is inappropriate and conflicts with the servicer's contractual rights. Instead, servicers should allow interest and fees to accrue on the account as per the loan documents. The Preamble also acknowledges that "this broad prohibition may result in servicers making payments to third party companies for delinquency-related services that servicers may not be able to recoup."[25] Yet, despite this acknowledgment, the Proposal provides no insight into whether the Bureau conducted a cost-benefit analysis to justify servicers incurring required pass-through costs without being able to appropriately recover them.

Additionally, the Proposal appears to prohibit any future recovery of fees after the loss mitigation review cycle is complete. As fees are restricted from accruing during the loss mitigation review cycle, it is not clear if and when a servicer may resume accruing fees and whether they can be recovered either because a delinquent borrower is performing again (i.e., reinstatement or capitalization) or the borrower satisfied a procedural safeguard and therefore the servicer is able to proceed to liquidation (i.e., foreclosure sale).

More fundamentally, the fee prohibition does not distinguish between a third-party cost that is merely passed through to the borrower and necessary to preserve the mortgage collateral (i.e., valuations, property preservation costs, or attorney's fees) vs. a service fee (such as a late fee, stop payment fee, or insufficient funds fee). The fee prohibition also fails to appropriately treat costs incurred outside of the loss mitigation review cycle. For instance, the Bureau must allow servicers to collect foreclosure-related costs and other default servicing-related fees incurred before the borrower requested loss mitigation, even if these amounts still need to be billed. This ensures servicers are compensated for legitimate expenses incurred based on the borrower's default status before the request.

In short, the Proposal misaligns incentives for borrowers to engage with their servicer. Fee 'protections' are automatically given if a borrower requests assistance, which may not provide sufficient reason for borrowers to complete the loss mitigation process. For example, a borrower that wants to file bankruptcy may first ask for loss mitigation assistance to avoid the related fees incurred by a servicer in asserting a claim and/or protecting its interest in the bankruptcy proceeding. Yet, the servicer would still be subject to the bankruptcy process and related costs despite taking no action to initiate it. The Proposal strongly interferes with a servicer's contractual rights with the borrower by prohibiting the collection of penalties for a borrower's breach of a mutually agreed upon contract (i.e., concerning late payments and interest accrual) and complicates and impedes certain investor loss mitigation options, like the GSE Flex Modification, which provides for capitalization of arrearages that include corporate advances and other third-party costs.

While the lack of details and improper incentive structure is concerning, the larger issue is that the Bureau does not have the statutory authority to implement its proposal. The Bureau cites the CARES Act as persuasive authority to temporarily limit mortgage servicing fees and its belief in the efficacy of those measures as justification to suggest its prohibition.

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[24] Consumer Financial Protection Bureau, Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties (Regulation X), at 46 (July 10, 2024).
[25] *Id.*

The Bureau's reliance on the CARES Act as a basis for the proposed fee limit is a point of concern. The Act's authority was limited to the circumstances surrounding the historic pandemic and national emergency and applied to borrowers who were performing under an active forbearance plan. Importantly, the CARES Act did not apply fee protections to borrowers who were not in an active loss mitigation option. Congress has not enacted any subsequent legislation enabling the Bureau to convert what was explicitly intended as a temporary measure into a permanent fixture of its servicing rules. Therefore, the Bureau's authority to enact this proposed fee limit must necessarily rest on the general sources of authority it cites as justification for the rule. Neither Dodd Frank's Section 1032 nor RESPA provides the Bureau with sufficient statutory authority to proscribe the charging of specific fees concerning default servicing.

Dodd Frank's section 1032 concerns disclosure and does not support this portion of the Proposal. [26] RESPA is not a fee-setting statute in its primary context of origination, nor did Congress intend for it to be one.[27] RESPA's statutory purposes focus entirely on origination, with a limited servicing focus concerning escrow accounts but nothing regarding default servicing. [28] Thus, RESPA's general purposes and Congress's intent should be read primarily through this lens—which does not include a generalized prohibition of fees in any context beyond referrals or other limited and enumerated circumstances. This authority is relevant in the servicing context as it informs the core purposes of RESPA that any appeal to general rulemaking authority must be founded on.

To the extent Congress intended RESPA to govern servicing fees through a subsequent amendment, it did so only in minimal circumstances.[29] Congress could have granted the regulators more sweeping authority in the servicing context but chose not to do so. Other commenters have noted that the Bureau's more extensive reliance on RESPA may be susceptible to challenge.[30] This reliance suggests that the Bureau should not go well beyond where Congress intended by regulating and prohibiting servicing fees under a statute that does not cover or address default servicing fees.

Finally, in addition to lacking a statutory basis, the Bureau's Proposal faces practical challenges and attempts to solve a problem that does not exist. Investor/insurer guidelines can (and often do) require servicers to waive late fees, penalties, stop payment fees, and similar charges accrued upon a borrower completing a loss mitigation option. Therefore, the

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[26] See 12 U.S.C. § 5532.
[27] Mortgage Bankers Association, Re: CFPB RFI Regarding Fees Imposed in Residential Mortgage Transactions (Aug. 2, 2024), available at https://www.mba.org/docs/default-source/advertising/cfpb-closing-cost-rfi-draft-final42cfd55c-6409-4d39-aede-2aa6d932f453.pdf?sfvrsn=964f3a7d_1.
[28] Bradley Arant Boult Cummings LLP, Re: Docket No. CFPB-2024-0024 (RIN 3170-AB04); Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X (Aug. 30, 2024), available at https://www.regulations.gov/comment/CFPB-2024-0024-0030.
[29] See 12 USC 2605(d) (forbids late fees being charged within 60 days of a loan transfer).
[30] Bradley Arant Boult Cummings LLP, Re: Docket No. CFPB-2024-0024 (RIN 3170-AB04); Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X (Aug. 30, 2024), available at https://www.regulations.gov/comment/CFPB-2024-0024-0030.

Bureau's proposal needs to be revised to address the actual contractual circumstances faced by servicers.

The Bureau lacks statutory authority to prohibit the collection of certain disclosed or contractual servicing fees on the basis set forth in this rule. It should not finalize these provisions as they lack both the sufficient legal basis or practical understanding of how servicing fees are charged, incurred or waived as appropriate.

iv. Provide appropriate exceptions to instantly halting the foreclosure process.

The Bureau proposes to amend § 1024.41(f)(2) to prohibit servicers from advancing the foreclosure process once the loss mitigation review cycle begins. MBA has repeatedly requested for the Bureau to provide appropriate exceptions or limitations around the requirements to halt the foreclosure process. These are crucial to ensure the smooth operation of the foreclosure process.

First, the Bureau should not require servicers to apply foreclosure protections instantly. To ensure industry consistency, the Bureau should provide a reasonable timeline for servicers to implement foreclosure protections upon a borrower's request for assistance, such as three business days. It is infeasible to expect that a request for assistance received at 9:00 AM should result in the cancellation of a foreclosure court hearing scheduled for 9:30 AM. The Official Commentary requires servicers to instruct foreclosure counsel "promptly" not to advance the foreclosure process and establishes that servicers are not relieved of their obligations because of counsel's actions or inactions. This problem is exacerbated if servicers must consider unclear written communications that inhibits a servicer from determining whether to start the loss mitigation review cycle. For these reasons, the Bureau should provide a concrete and commercially reasonable allowance of time for servicers to apply protections. While we recognize that the timeline for servicers to coordinate with counsel is undefined today, failing to provide servicers with a short grace period to process documents and operationalize foreclosure holds sets an unreasonable expectation that any advancement of foreclosure processes during the protection period can be unwound instantly.

Moreover, the Bureau should create exceptions for court-ordered foreclosure actions, borrower requests, mediation, or necessary steps to preserve the statute of limitations. The Bureau must recognize that the foreclosure process is governed by state law and certain requirements are outside the servicer's control. The Bureau does not consider differing state law procedures when prohibiting the process from advancing. For instance, some states also require servicers to adhere to specific milestones; some courts are reluctant to adhere to a constant hold because it negatively affects the borrower by increasing the amount necessary to reinstate the loan. There are other applicable nuances that the Bureau does not consider, such as restart states (states where a sale can only be postponed for a limited amount of time, after which the servicer would be required to refile or restart the foreclosure process).

The Bureau also does not provide an exception for state statutes of limitations. Loss mitigation holds do not toll the state statute of limitations for all states. Any discontinuance at that point could, in certain circumstances, render the lien unenforceable. A recent example is New York's Foreclosure Abuse Prevention Act, which provides that a voluntary discontinuance of foreclosure does not reset the statute of limitation, and instead, a reset requires either a borrower waiver or the receipt of a voluntary regular payment.

Instead of a broad and vague prohibition on advancing the foreclosure process, if the request for assistance was received more than 37 days before a scheduled sale, the Bureau should require the servicer to make reasonable efforts to postpone any scheduled foreclosure sale or other foreclosure action but allow the servicer to proceed where required by the court, other applicable legal factors or as requested by the borrower. The Bureau should also clarify that breach letters and pre-foreclosure notices do not constitute "advancing the foreclosure process" since such notices precede the foreclosure process, provide borrowers with critical information about their loan/property status, and are required by contract and state law.

A prohibition against advancing the foreclosure process could extend the foreclosure timeline indefinitely for borrowers who continue the loss mitigation review cycle without meeting procedural safeguards. The inability to enforce the mortgage contract could increase the cost of servicing, damage mortgage servicing right (MSR) values, and increase the cost of credit access.

b. Loss Mitigation Determination and Early Intervention Notices

The Bureau proposes several changes to the loss mitigation determination and early intervention notices that significantly expand the amount of information required to be provided to a borrower. In particular, the loss mitigation determination notice creates individualized, investor-specific notices that significantly increase the operational complexity and compliance risk for servicers to ensure accurate communications. The introduction of complex and detailed information will impair a servicer’s ability to adjust their operations to scale.

Notably, both notices include requirements to identify investors (owners/assignees) and list all available loss mitigation options. Identifying the investor provides little benefit to consumers, which the Bureau does not justify, and should be removed. Servicers are accountable to their investors, insurers, or guarantors for following the loss mitigation waterfalls under which the borrower would be evaluated. For example, a loan being FHA-insured dictates the availability of certain loss mitigation options and not that the loan is owned by a Ginnie Mae security holder or held on the balance sheet of a participating servicer. This requirement alone would introduce significant operational challenges for servicers and create borrower confusion, particularly when a private investor is involved.

Additionally, we recommend the Bureau:

i. Simplify the Loss Mitigation Determination Notice

As proposed, § 1024.41(c) requires a servicer to promptly provide the borrower with a written notice stating the determination to offer or deny any loss mitigation assistance if a borrower requests assistance more than 37 days before a foreclosure sale. The determination notice includes eight specific requirements, in addition to notifying the borrower about the amount of time for the borrower to accept or reject an offer, the right to appeal the determination and the amount of time for the borrower to file an appeal, and the specific reason(s) to offer or deny any loss mitigation option. These proposed changes aim to provide clarity and understanding to all parties involved, yet in practice create borrower confusion.

Given its operational complexity and the potential for consumer confusion, the Bureau should revise the determination notice and website requirements. The determination notice should only be required after a servicer's final denial of a borrower for all available loss mitigation options. A determination notice should not be required to offer a loss mitigation option. Instead, its primary purpose should be to inform the borrower of the servicer's determination and encourage the borrower to contact their servicer to discuss specific, detailed reasons for a loss mitigation denial to determine what, if any, additional options may be available. These recommendations have the potential to streamline the process and provide more tailored solutions to borrowers.

The Bureau requires the servicer to send *the same* information for both offers and denials, which is not conducive to helping borrowers complete the loss mitigation process, particularly in the case of offers. A loan must meet all investor eligibility requirements to qualify for a loss mitigation option. To comply with the proposed requirement with respect to an offer, the servicer would have to list every eligibility criterion for that option, which could end up being a list of over a dozen eligibility criteria, to meet the proposed requirement to list the "specific reason or reasons" for a loss mitigation offer. Such requirements add significant customization and length to an already long and complex letter, with little to no borrower benefit. A borrower seeking detailed information about the factors that went into their determination would be better served by calling their servicer to request such information rather than reading pages of eligibility criteria in a determination notice.

Additionally, the Bureau should thoroughly evaluate the consumer benefit of the determination notice's required elements compared to the operational burden each would impose. The notice does not clearly define a key borrower-provided input but merely provides an example (e.g., household income). Likewise, what constitutes a non-borrower-provided input is not specified, but the example is a property valuation or a credit score.

The Proposal requires all servicers must have a website available that lists all investor-specific loss mitigation options available to a borrower. The website must include "the non-borrower provided inputs," which is not operationally feasible if tailored to the individual borrower. The proposal needs clarity on the expected nature and content of the website. For example, it's not clear whether the "non-borrower provided inputs" are intended to be general eligibility criteria (e.g., 'A loan must be 2-6 months delinquent to qualify.') or account-specific information (e.g., 'Your loan is four months delinquent as of the evaluation date.'). Instead, the Bureau could create a website—perhaps in concert with the government insurers and guarantors—that generally describes the primary loss mitigation

solutions offered by top investors/insurers, providing a clear and feasible solution to the operational challenges that would present the information consistently in one location.

Under the Proposal, servicers would also be required to list all other loss mitigation options that may remain available to the borrower, along with a list of loss mitigation options previously offered to the borrower that remain available. This proposal implies that loss mitigation eligibility is static, which is not the case. Eligibility for loss mitigation can change from one month to the next, based on delinquency, borrower hardship status/affordability, and other factors. For example, a borrower who is offered a repayment plan in a determination notice may also meet the eligibility requirements for a GSE Payment Deferral as of the date of the determination notice, but they may no longer be eligible for a Payment Deferral if another payment is missed the following month. Providing a list of options that “remain available” puts servicers at risk of providing borrowers with stale or inaccurate information and is likely to increase borrower confusion. Instead, we recommend providing a general list of the types of options that may be available (similar to the list to be provided in the early intervention notice) and encouraging the borrower to contact the servicer to discuss their situation and eligibility for other loss mitigation options.

Given the nuances and complexity of the loss mitigation review and decision process, servicers should focus their resources and attention on having meaningful, dynamic conversations with borrowers regarding the status of their loss mitigation review, answering specific questions about their loss mitigation determination, and discussing available options based on the borrower's unique circumstances. These conversations are crucial in ensuring that borrowers feel engaged and involved in the process. Requiring overly detailed or complicated information on a website or in long and complex notices will not be as effective in helping borrowers understand the actual universe of options and may actually drive borrower confusion or disengagement.

c. Language Access

MBA supports the Bureau's goal of providing borrowers with limited English proficiency (LEP) the tools to review early intervention and certain loss mitigation communications in languages other than English. However, the language-related concepts outlined in the Proposal are overly broad, vague on key operational details, and – with the limited information provided in the Proposal – do not offer benefits to many borrowers relative to the incredible cost. This proposal is operationally infeasible due to the significant resources and time required to implement it and would disincentivize and inhibit the sale of mortgage servicing rights.

As the Bureau admits in its Proposal, there are many ways to structure possible LEP requirements. However, the extreme lack of guidance and the Bureau's failure to define critical terms is concerning. Given the significant costs and operational complexity, the Bureau should conduct a proper cost-benefit analysis, repropose regulatory text for their proposed LEP requirements and provide stakeholders with the appropriate time to comment before finalizing any LEP requirements for servicers.

Some have already cast doubt on whether the Bureau has sufficient authority under RESPA to suggest such a sweeping regulatory scheme. [31] The Bureau can partially address this concern by limiting the scope of the rule, better articulating its authority and publishing the proposed text in a new proposal rather than finalizing the concepts discussed in the Preamble.

The primary goal of a future proposed LEP rule should be to educate the borrower about complex loss mitigation concepts. The Bureau's 2024 Report on Borrower Experiences with Mortgage Servicing During COVID-19 found that many borrowers needed help understanding the loss mitigation process. It concluded that “the complexity of processes for receiving help with payment difficulties may have created barriers to accessing loss mitigation for some borrowers, and these barriers may have been relatively higher for distressed borrowers with limited English proficiency.” [32] A future proposal focused on standardized and approved model language on forms and live over-the-phone explanations of critical concepts can best address this issue. The Bureau should encourage meaningful, real-time conversations between the borrower and servicer rather than imposing costs for numerous complex and lengthy notices.

i. **The Bureau Must Conduct a More Informed Cost-Benefit Analysis**

The Bureau must conduct a robust cost-benefit analysis for their proposed LEP requirements.[33] Providing the LEP services under the concepts discussed in the Preamble of the Proposal will require tremendous amounts of time and resources to implement given the magnitude of this rulemaking. Additionally, a survey of self-reported MBA member data highlights the need for a cost-benefit analysis given the small number of LEP borrowers, particularly non-Spanish LEP borrowers. [34] Servicers who responded to the survey reported that Spanish-speaking borrowers who request vendor assistance make up less than five percent of their servicing portfolio. For example, while parts of the NPRM focus on the “five most common” languages, members report that of borrowers who request vendor-provided interpretation assistance, the fourth and fifth most common languages each makeup less

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[31] Bradley Arant Boult Cummings LLP, Re: Docket No. CFPB-2024-0024 (RIN 3170-AB04); Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X (Aug. 30, 2024), available at https://www.regulations.gov/comment/CFPB-2024-0024-0030.
[32] Consumer Financial Protection Bureau, Borrower Experiences with Mortgage Servicing During the COVID-19 Pandemic, at 10-11 (June 2024), available at https://files.consumerfinance.gov/f/documents/cfpb_borrower-experiences-withmortgage-servicing_2024-06.pdf.
[33] *See* Congressional Research Service, Cost-Benefit Analysis in Federal Agency Rulemaking (March 8, 2022), available at https://crsreports.congress.gov/product/pdf/IF/IF12058. Under 44 U.S.C. § 3502(5) it can be argued the CFPB is exempt from certain cost-benefit analysis requirements such as those under Executive Order 12866 as an independent agency. The exemption in that Order was for independent agencies and “Presidents have chosen to exempt these agencies from E.O. 12866, because Congress designed them to be independent of the President and, by extension, OIRA and OMB.”. This rationale clearly no longer applies to the CFPB as it is not legally independent of the President and it is debatable if CFPB is thus still properly included in a statutory list of independent agencies. *See* Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. ___ (2020)
[34] Anonymous Survey Results are available at https://apps.mba.org/pdf/LEP_Survey_Responses_Anon.pdf.

than one percent (and, in most cases, less than one-half of one percent) of their total servicing portfolio.

These small numbers illustrate the reality that the number of borrowers that would be impacted by the proposal is likely to be very small. A recent report by the Urban Institute thoughtfully analyzes the number of people who have limited English proficiency. Based on the Urban Institute's data set, a relatively small percentage of the US population (just under four percent) is LEP, and only a very small percentage of LEP households with a mortgage will seek loss mitigation assistance. Each servicer is likely to have few borrowers who need translation services in a language other than Spanish.[35] Simply put, the Bureau's Proposal fails to address the reality that it would require costly and cumbersome translations of documents for populations that represent a miniscule fraction of a servicer's portfolio.

ii. A Future Proposal Must include Bureau-developed Model Notices and A Safe Harbor

For any future proposal, the Bureau should develop model forms in non-English languages for notices required under 12 C.F.R. § 1024.39(b) and .39(e)(2) and provide a safe harbor to servicers who use them after a borrower makes an affirmative request to the servicer to communicate in that language. [36] As discussed in further detail below, the Bureau's Proposal requires that servicers bear the risk of ensuring that written communications are translated "accurately" – a term the Bureau does not define. If the Bureau cannot develop model non-English notices that it believes comply with its regulatory requirements, it would be fundamentally unfair to expect servicers to do so.

The Bureau apparently decided not to provide model language so that servicers have flexibility to develop their communications and reduce the cost of compliance for those servicers who already have translated documents.[37] However, it is unclear why requiring servicers to translate documents themselves is less costly than using those created by the government. In the past, the federal government provided translated documents to covered entities. For example, the Bureau already provides model early intervention clauses in Spanish. [38] Other federal agencies have also provided model translations in additional languages, such as the non-discrimination and language availability notices required under Section 1557 of the Affordable Care Act that Health and Human Services provide. [39]

[35] *See* Urban Institute, The CFPB's Servicing Rules Are Generally Well Conceived but Need Improvements, pg. 3-4 (Aug. 2024), available at https://www.urban.org/sites/default/files/2024-08/The_CFPBs_Servicing_Rules_are_Generally_Well_Conceived_but_Need_Improvements.pdf.
[36] *Id.* at 6. Similarly, the Urban Institute supports the CFPB providing model or sample notices for servicers in Spanish and in other languages that are accessible through a database system the Bureau manages and that servicers who choose to use such forms would receive a safe harbor.
[37] Consumer Financial Protection Bureau, Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties (Regulation X), at 90 (July 10, 2024).
[38] Consumer Financial Protection Bureau, Mortgage Servicing: Early Intervention Written Notice Model Clauses and Translations (July 2021), available at https://files.consumerfinance.gov/f/documents/cfpb_mortgage_servicing_early_intervention_model_clauses_translations_2021-07.pdf.
[39] Department of Health and Human Services, Resources for Covered Entities (Aug. 2024), available at https://www.hhs.gov/civil-rights/for-providers/resources-covered-entities/index.html.

Model language would be most appropriate for early intervention notices and the notices signaling the end of forbearance, and the Bureau is encouraged to develop such notices with stakeholder input. However, the Bureau must not require servicers to translate the loss mitigation determination notice given its complexity and the potential for significant consumer confusion. Instead, the Bureau should encourage borrowers to contact their servicer to discuss the specific reasons for a loss mitigation determination, aided by an interpreter, which provides more benefits to consumers than translating a complicated notice.

iii. **The Bureau Should Remove the Proposed Marketing Standard in Any Future Proposal**

In a future proposal, the Bureau should remove the requirement for servicers to provide translation or interpretation services of certain written and oral communications in languages the servicer "knows or should have known" were used to market to the borrower. This requirement is likely to chill non-English language marketing efforts and result in less access to credit as lenders who sell mortgage servicing rights (MSRs) and servicers that purchase them would understandably want to avoid the onerous obligations in this proposal that would severely curtail the salability of these MSRs, potentially cutting off a vital source of capital for future lending.

Servicers are not in control of and rarely have insight into loan originators' marketing decisions or practices. Servicers acquire loans and MSRs from many sources and are not likely to know whether the loan was marketed in a particular language. Requiring servicers to provide translated documents to borrowers marketed in another language deters the purchasing of MSRs. MSRs are often transferred between servicers, and those purchasing servicers may be required to adjust their operations to offer translation services in any language, even those not reflective of any other borrowers in their portfolios. Under the proposed rule, purchasers of MSRs would take on obligations and legal risks by bringing in LEP borrowers.

iv. **Spanish Translations Should Only Be Provided to Spanish-Speaking Borrowers Upon Request in a Future Proposal**

Servicers should only be required to provide Spanish-translated documents to borrowers upon request– not all borrowers. Self-reported data from MBA members shows that Spanish is the most common language requested by the LEP population. However, these borrowers still make up only a small percentage of borrowers, in most cases less than five percent of servicers' overall portfolio. This is echoed by the Urban Institute comments, which note "less than 3 percent of total borrowers are Spanish-speaking LEP households." We question whether it makes sense to send all the early intervention and loss mitigation documents to all borrowers in Spanish."[40]

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[40] Urban Institute, The CFPB's Servicing Rules Are Generally Well Conceived but Need Improvements, pg. 5 (Aug. 2024), available at https://www.urban.org/sites/default/files/2024-08/The_CFPBs_Servicing_Rules_are_Generally_Well_Conceived_but_Need_Improvements.pdf. Urban

Moreover, in other rulemakings, the Bureau has found that requiring all notices to include a Spanish translation is unnecessary for most non-Spanish-speaking consumers but would involve substantial cost increases for servicers. [41] The Bureau has previously determined that targeted language access intervention is appropriate.[42] Overall, the Bureau should incorporate the lessons learned in other rulemakings and limit the provision of Spanish translations to Spanish-speaking borrowers in a future rulemaking.

v. **In a Future Proposal, the Bureau Should Reduce the Number of Required Languages**

The Bureau should limit the number of non-English languages servicers must provide from five to three – one of which should include Spanish. The Bureau should take responsibility for selecting the two remaining languages, ensuring they are the most commonly spoken languages among borrowers other than English and Spanish. This change will mitigate the risk of inaccurate translations or interpretations, decrease operational complexity, and eliminate unnecessary consumer confusion. A single, consistent standard that applies equally to all servicers would also help avoid some of the secondary market concerns noted above in our discussion of the marketing standard.

Absent this change, servicers would be required to monitor their servicing portfolios to identify covered languages continuously. Servicers traditionally do not track borrowers' language preferences on all loans – particularly for loans or MSRs originated or acquired before the implementation of the Supplemental Consumer Information Form (SCIF). [43] While servicers can select the languages used for translation and interpretation services, these languages must collectively address the needs of at least a "significant majority" of their non-Spanish-speaking borrowers with LEP needs. However, "significant majority" is not defined, creating a problem in constantly changing servicing portfolios. Absent concrete direction, servicers will need to continually monitor their portfolio to determine whether the languages they selected constitute a significant majority of LEP borrowers.

goes on to recommend "in favor of sending the initial loss mitigation notice (the early intervention notice), which includes information on how to contact their servicer, to all borrowers in English and Spanish. We recommend that the borrower then have the option to receive all further communications in Spanish Borrower opt-in should be (1) prominently displayed in the translated document with alternative font for emphasis and (2) sent as a separate document in the same mailing." While MBA needs to give this solution more consideration, we agree that a blanket requirement to send all borrowers Spanish language communications is not supported by the data.

[41] Bureau of Consumer Financial Protection, Debt Collection Practices, at pg. 121 (Regulation F) (Dec. 18 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_final-rule_2020-12.pdf.

[42] *Id.*

[43] Department of Housing and Urban Development, Press Release HUD No. 23-126 (June 27, 2024) ("The SCIF… is an industry-recognized form used during the mortgage application process that allows borrowers to voluntarily identify language preferences and provide information on housing counseling and homeownership education they may have received.").

The Bureau must sufficiently analyze why servicers must select five languages.[44] As previously stated, LEP borrowers generally constitute only a very small fraction of a servicer's loans: the fourth and fifth most common languages spoken by those requesting vendor interpretative assistance make up less than one-half of one percent of a servicer's portfolio in most cases. [45] Depending on servicer size, this usually means less than two hundred individual borrowers for each language. [46]

To provide beneficial LEP services, any final rule should be limited to the three most common non-English languages as determined by and translated by the Bureau (one of which is Spanish). Instead of covering five languages, servicers should be able to use a Bureau-provided statement that can be added to all loss mitigation notices that explain to the borrower that additional language interpretation services may be available by calling their servicer. For borrowers with other language needs, services should only be required to use best efforts to provide oral explanations of the early intervention and loss mitigation notices in a language the borrower requests (via vendor assistance).

vi. **Do Not Create a Private Right of Action in a Future Proposal**

As noted above, we believe the Bureau should create model translations upon which servicers can rely. If, however, the Bureau declines to do so, it should at least provide some measure of protection for servicers' good faith attempts to create their own. Creating a private right of action for receiving inaccurate translations would subject servicers' attempts to provide helpful consumer information to unfair litigation burdens and increased scrutiny, given that the Bureau proposed that failure to provide accurate translations would also violate the underlying loss mitigation requirements that carry the private right of action. [47] As previously mentioned, the primary goal of delivering LEP services is to ensure meaningful information and borrower education. Exposing servicers to potential liability for good faith efforts to provide useful loss mitigation information to borrowers could lead to many potentially frivolous or unfounded legal challenges and increased litigation costs. These costs and risks could function as a powerful deterrence participating in mortgage servicing.

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[44] *See* Urban Institute, The CFPB's Servicing Rules Are Generally Well Conceived but Need Improvements, pg. 6 (Aug. 2024), available at https://www.urban.org/sites/default/files/2024-08/The_CFPBs_Servicing_Rules_are_Generally_Well_Conceived_but_Need_Improvements.pdf. ("As for the other languages, the number of affected borrowers is much smaller than in English. Chinese is the second-most-used language, with an LEP population that is less than one-tenth of the Spanish-speaking LEP population (and Chinese consists of at least two languages, making the numbers even smaller). We believe it makes little economic or operational sense to have each servicer do its own translations, thus increasing the importance of model translations from the bureau to ensure some level of consistency and uniformity by servicer.").

[45] Of the eight servicers who provided complete information, seven out of eight respondents indicated that the fourth and fifth most common vendor requests make up less than 0.5% of their portfolio. Anonymous Survey Results are available at https://apps.mba.org/pdf/LEP_Survey_Responses_Anon.pdf.

[46] *Id.* Of the seven servicers who provided complete information, four out of the seven respondents indicated that the fourth and fifth most common vendor requests make up two hundred borrowers or less. *Id.*

[47] Consumer Financial Protection Bureau, Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties (Regulation X), at 87, 91 (July 10, 2024).

Determining what is and is not an inaccurate translation can be difficult. For one, what is considered an "accurate" translation is not defined in the proposed rule. Additionally, words or concepts in one language may have a vague analogy in another language. A straightforward word-for-word translation may be appropriate in one language, while for another, it may be better to explain meaningful concepts instead. Accuracy is a moving target that is often context specific.

Accordingly, the Bureau should structure any future proposal as the addition of LEP standards to 12 CFR § 1024.38, requiring servicers to have policies and procedures to provide mortgage servicing communications to borrowers in languages other than English without creating a private right of action.[48] Additionally, the Bureau should not consider violation of these LEP provisions to be a violation of the requirements in either 12 CFR § 1024.32 or 12 CFR § 1024.41, which would create a private right of action. [49] As the Bureau and others are able to supervise and enforce the requirements in 1024.38, meaningful supervision and compliance would still be required.

III. Other Issues

The Bureau asks for additional comment on credit reporting and any potential conflicts the new loss mitigation rules would have with state laws. We recite previous comments and recommendations below.

a. Credit Reporting

The Bureau does not have the authority to regulate credit reporting under RESPA. Therefore, the Bureau should avoid pursuing additional rulemaking under Regulation X to preserve CARES Act standards.

The Fair Credit Reporting Act (FCRA) requires data furnishers (servicers) to accurately report a consumer's credit information to a credit reporting agency. We do not support efforts by the Bureau to take steps to make permanent or expand the temporary protections created by the CARES Act within Regulation X. The Bureau should not place blanket limits on credit reporting or a mortgage servicer's obligation to report accurately as a furnisher of data. The ability to assess credit risk is a bedrock component of the housing finance system and is vital to ensuring affordable credit access for consumers and preserving the safety and soundness of investors and guarantors. Efforts to permanently suppress accurate data will harm our industry and the borrowers we support by distorting credit models, raising prices, and creating a more inefficient and costly market.

Moreover, the Bureau could create legal and regulatory risks if it enacts credit reporting regulations that are not clear, well-defined, and aligned with both the legal obligations created by the FCRA (including that information furnished be accurate, complete, and substantiated by the furnisher's records at the time of furnishing) and standard data reporting formats (Metro 2). Regulations that use a subjective or vague phrase like

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[48] 12 CFR § 1024.38 - General servicing policies, procedures, and requirements.
[49] 12 CFR § 1024.32 - General disclosure requirements; 12 CFR § 1024.41 - Loss mitigation procedures.

"negative credit reporting" would introduce confusion, create inconsistent reporting unsupported by furnisher records, and be considered inaccurate under FCRA.

b. State laws

The Bureau must acknowledge that a complete departure from Regulation X's existing application framework may conflict with several state laws. Examples of such states include but are not limited to NY, CA, NV, and WA. As a result, servicers will be forced to operate under two different, overlapping federal and state loss mitigation regimes simultaneously, which could lead to significant borrower confusion and no-win situations for even the most diligent servicer attempting to comply with all requirements. Therefore, we recommend that the Bureau preempt state laws that are based on a framework different from the one adopted by the Bureau in the new rule if the Bureau adopts the proposed or modified framework.

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In closing, we urge the Bureau to recognize that default servicing is a highly technical process governed by increasingly complex early intervention and loss mitigation standards. Borrowers should be encouraged to collaborate with their servicer to properly assess their individual circumstances to resolve their financial hardship. We appreciate the Bureau's consideration of these comments. Should you have questions or wish to discuss these issues further, please contact Justin Wiseman at JWiseman@mba.org, Brendan Kelleher at BKelleher@mba.org, or Alisha Sears at ASears@mba.org.

Sincerely,

Pete Mills
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