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MORTGAGE BANKERS ASSOCIATION

May 4, 2023

Mr. Ashwin Vasan  
Associate Director, Research, Monitoring, & Regulations  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, D.C. 20552  
CC: Mark McArdle, Assistant Director, Mortgage Markets

**RE:** Request to Conduct Rulemaking on Regulation X Early Intervention Requirements and Loss Mitigation Procedures

Dear Mr. Vasan,

On behalf of our members, the Mortgage Bankers Association (MBA)<sup>1</sup> is writing to encourage the Consumer Financial Protection Bureau (the Bureau) to expedite many much-needed changes to the loss mitigation regulations of the Real Estate Settlement Procedures Act (Regulation X).<sup>2</sup> As we noted in our recent white paper regarding the [Future of Loss Mitigation](#), updating the loss mitigation regulations under Regulation X is imperative to create a clear and durable regulatory framework for consumers and servicers.

We understand the Bureau is considering amending Regulation X based on past Requests for Information (RFI), including the Bureau's November 2022 RFI Regarding Mortgage Refinances and Forbearances and appreciate that the rulemaking process takes time to complete.<sup>3</sup> We welcome a public commitment by the Bureau to amend Regulation X, especially given that such rulemaking is not currently on the Regulatory Agenda. Such a commitment reflects the importance of the need for mortgage servicers to timely assist distressed borrowers in any market condition and promotes a positive loss mitigation experience for consumers.

The COVID-19 pandemic made abundantly clear that Regulation X reform was necessary, as the overwhelming need for borrower relief magnified existing elements of the regulation that contributed to consumer confusion, ambiguity in the rule's application or delayed delivery of assistance. As we enter the post-pandemic era with the recent expiration of the COVID-19 National Emergency, and as other federal agencies have already begun

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 330,000 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 over 1,700 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](http://www.mba.org).

<sup>2</sup> 12 C.F.R. §§ 1024.39, 1024.41.

<sup>3</sup> Mortgage Bankers Association, "Re: Docket No. CFPB-2022-0059 CFPB Request for Information Regarding Mortgage Refinances and Forbearances" (November 28, 2022), available at <https://www.regulations.gov/comment/CFPB-2022-0059-0116>.

evolving their respective loss mitigation policies and programs to incorporate lessons learned during the pandemic, the need for the Bureau to revise the loss mitigation regulatory framework is even more pressing.

To accomplish this, we recommend the Bureau initiate formal rulemaking to comprehensively amend Regulation X focusing on the following issues:

1. Eliminate servicers' early intervention live contact obligations while borrowers are engaged in different stages of the loss mitigation process, including situations where a complete loss mitigation application is being evaluated by the servicer, and when borrowers are performing on loss mitigation options that do not bring their accounts current;
2. Eliminate the need for confusing and often conflicting early intervention written notices when borrowers are in forbearance;
3. Create a clear standard for when a servicer must consider a borrower to have submitted a "loss mitigation application," particularly when having verbal conversations with delinquent borrowers. The standard should unambiguously provide sufficient flexibility for servicers to comply with investor guidelines regarding loss mitigation application requirements;
4. Establish a clear standard for when a loss mitigation application must be considered "complete";
5. Clarify when certain loss mitigations offered by a loan's investor are "available" to a borrower, especially in light of investors that contemplate separate waterfalls for different scenarios; and
6. Eliminate or, in the alternative, limit the anti-evasion clause so that consumers can receive efficient relief and servicers can satisfy their investor's expectations, especially for borrowers that need long-term payment reduction without first completing a forbearance.

As we reflect on how the COVID-19 pandemic impacted the mortgage servicing industry and plan for the future of loss mitigation, it is necessary to address the loss mitigation rules in Regulation X that inadvertently served as a barrier to getting consumers the assistance that state and other federal government agencies were developing. The Bureau's rationale in 2012 and 2013 for how these rules were structured no longer applies to the evolved mortgage servicing industry, and the rules do not provide the intended protections to consumers. In fact, they may be causing more problems than benefits. Absent action by the Bureau to propose revisions, the current rules will continue to result in additional unnecessary harm to both consumers and the servicing industry.

The Bureau's remedial actions throughout the pandemic further illustrate why the loss mitigation rules in Regulation X need to be overhauled to provide clarity and eliminate unnecessary ambiguities to the servicing industry. First, after the CARES Act was passed into law, the Bureau published a [Joint Statement](#) with other federal regulators and also released a set of [Frequently Asked Questions](#) (FAQs) in April 2020 to explain how the CARES Act forbearance requirements interplay with the existing loss mitigation rules. Together, these documents provided the servicing industry with informal, non-binding guidance on critical concepts such as whether a conversation with a borrower who is requesting forbearance must be considered a "loss mitigation application," as that phrase is defined in Regulation X, and what a servicer's obligations are when making such an

offer and for the duration of the forbearance plan. This guidance was effective at helping consumers and reducing customer confusion until it was rescinded by the Bureau in November 2021.

The loss mitigation rules are far too rigid and restrictive, which quickly became apparent early in the pandemic. For example, in the spring of 2020, the GSEs released their COVID-19 deferral programs, which were intended to be offered without requiring a complete application from the borrower. However, Regulation X's anti-evasion clause created unnecessary risk for servicers who were required to offer these options in a streamlined fashion. Because the rules don't provide sufficient flexibility, the Bureau was forced to react to these new programs. In response, the Bureau issued the 2020 COVID-19 interim final rule, easing the existing restrictions and paving the way for COVID-19 deferral and partial claim programs to be offered as contemplated. A similar story played out in the summer of 2021, resulting in the Bureau once again amending their regulations and allowing servicers additional flexibility to offer certain streamlined modification options to borrowers based upon an evaluation of an incomplete application as defined by the rule.

While we appreciate the Bureau's responsiveness, we do not believe that numerous interim rulemaking processes should be necessary to allow servicers to offer borrowers permanent streamlined deferral and modification options, particularly when some of those options have long been part of the waterfall of options offered by the federal agencies. Additionally, the Bureau's COVID-19 rulemakings were too limited in scope and did not address several scenarios, such as post-natural disaster loss mitigation options, where a servicer's ability to efficiently work with consumers is inhibited by the ambiguity, complexity, and rigidity of Regulation X. Under the Bureau's guidance, streamlined flexibility is limited to products that are offered to COVID-impacted customers. As a result—unless an identical program is available for COVID-impacted customers—there are still options that are designed to be streamlined that servicers are not offering to borrowers in need unless and until they can submit a complete loss mitigation application. The Bureau should eliminate any tie-in to a national emergency, such as the COVID-19 pandemic, and allow servicers more flexibility to offer streamlined options as dictated by a loan's investor guidelines.

The COVID-19 pandemic made it clear that the Bureau should modernize the loss mitigation rules in Regulation X. The regulation should establish overarching guardrails to protect consumers, while also affording discretion to have the flexibility to act quickly and help their consumers when it is needed. Establishing clear, straightforward, and easily navigable guardrails will help servicers mitigate risk and allow consumers to get access to relief.

We urge the Bureau to take the necessary steps to reform Regulation X and to do so through the formal rulemaking process. Moving forward, we also respectfully request that the Bureau limit its use of blog posts, FAQs, exam manual updates, and other informal sources of guidance to establish new expectations of the industry, especially regarding the interpretation of crucial terms in the Bureau's rules. Informal guidance certainly has its place, but it is of limited value to the servicing industry when it comes to loss mitigation given that the law can be enforced through a private right of action. Additionally, informal interpretations and guidance can, and often has: (1) created conflicts with standard industry practices without the benefit of the industry's input, which the formal rulemaking process obviously benefits from; (2) created potential conflicts or ambiguities that require servicers to risk private lawsuits in order to follow the Bureau's informal guidance; (3)

limited servicer's ability to comply with investor requirements; and (4) resulted in confusion due to the lack of available detail typically provided in informal guidance. Therefore, it is critical to the industry that the Bureau limit its use of informal guidance, especially when it comes to the interpretation of crucial terms in the Bureau's loss mitigation rules.

In sum, we are in a pivotal moment where we can incorporate valuable lessons from the pandemic and put our energy into ensuring the law works better for consumers and servicers alike in the future. The rules are too complex and confusing, and very often are heavy-handed and overly restrictive when it isn't needed. Simplifying the regulatory framework would benefit both consumers and the servicing industry, and we hope the Bureau works to make the necessary changes as quickly as possible.

We appreciate your time and consideration of this matter. To the extent we can help with these issues, we are always willing to discuss the various areas of the law where there may be opportunity for additional clarity or simplicity. Should you have questions or wish to discuss these issues further, please contact Brendan Kelleher at 202-557-2779 or via email at [Bkelleher@mba.org](mailto:Bkelleher@mba.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is fluid and cursive, with a large initial "P" and "M".

Pete Mills  
Senior Vice President  
Residential Policy and Strategic Industry Engagement