May 10, 2021

Mr. Dave Uejio
Acting Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

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

Dear Acting Director Uejio:

The Mortgage Bankers Association (MBA)[1] and the National Mortgage Servicing Association (hereafter, the "Associations") appreciate the opportunity to comment on this notice of proposed rulemaking (NPR) from the Consumer Financial Protection Bureau (the Bureau or CFPB) to amend the Regulation X servicing rules in response to the continuing COVID-19 pandemic.

The Associations support the proposed rule's objectives of ensuring that servicers communicate timely and accurate information to borrowers about their loss mitigation options, and that there be proper and fair assessments of foreclosure avoidance options. We also appreciate the Bureau's efforts to clarify the complex Regulation X provisions. There are, however, elements in the proposal that require further attention, and several critical improvements that should be made to ensure that borrowers can be fairly and efficiently served by their mortgage servicer. We offer several recommendations that will strengthen the servicing rules and provide appropriate protection for those borrowers who need it the most, reduce the risk of borrower confusion and frustration and are appropriately limited in scope so that servicer resources can focus on sustainable consumers outcomes and not on implementation of the final rule.

[1] 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.

I. General Comments

Since the outset of the pandemic, mortgage servicers have worked tirelessly to offer robust support programs for homeowners affected by the COVID-19 pandemic. The mortgage servicing industry moved its workforce to remote work almost overnight, increased capacity by hiring new and reallocating existing staff and created additional portals and functionality for web platforms and mobile applications in order to quickly respond to record numbers of customer inquiries. In the first 10 weeks of the pandemic servicers processed approximately 4.3 million forbearances. Incredibly, while total CFPB complaints were up 54% year over year from 2019 to 2020, mortgage servicing complaints actually dropped.

The servicing industry's efforts to date demonstrate that it is fully aligned with the Bureau's mission, and mortgage servicers remain committed to helping consumers remain in their homes as they regain their financial footing. Our industry's united energies assisted pandemic-impacted borrowers while advancing approximately $19 billion in missed mortgage payments to investors in government-backed mortgage securities. Indeed, it is important to note that the servicing industry has already helped millions of borrowers without the aid of these proposed rules.

The Associations and their members are committed to working with the Bureau to assist borrowers with COVID-related hardships, but caution that introducing complex new requirements during the time period when the largest group of forbearance plans expire risks introducing uncertainty and unnecessary complication for servicers and the very consumers that the Bureau seeks to help. Regulatory implementation requires servicers to dedicate significant resources towards revising policies and procedures, re-programming systems, training employees, and implementing new testing, monitoring and controls. This diverts crucial resources from resolving borrower problems. Considering the industry's commitment to and demonstrated record of success helping mortgage borrowers, the Associations urge the Bureau to consider whether this diversion of resources will achieve the benefits intended by the Bureau.

Additionally, we note the evidence suggesting that a strong economic recovery is taking place, which may alleviate the need for the Bureau's actions. This recovery is strengthened and supported by a successful vaccination program, which is spurring robust economic growth and increases in employment, including in some of the hardest hit industries such as travel and entertainment. The strength of this recovery is also borne out in the forbearance statistics, which indicate that as the jobless rate declines an increasing number of borrowers in forbearance are able to restart their prior loan payments or successfully work with their servicer in finding sustainable long-term solutions for repaying their mortgages.

With that said, and in the spirit of working with the Bureau to assist borrowers with COVID-related hardships, we offer the following recommendations regarding the proposal.

II. Section-by-Section Comments

A. The foreclosure moratorium should include clear exceptions to prevent the harm the proposed rule seeks to address.

Borrowers should be given every opportunity to avoid foreclosure. This requires that borrowers receive timely and accurate information about available loss mitigation options and how to access them, information about documentation necessary to apply for loss mitigation and assistance completing the application, and protection from foreclosure referral while the borrower is working actively with the servicer to address their delinquency. These safeguards, however, are already codified in Regulation X, and there is no evidence to suggest that the current rules provide inadequate protection to borrowers confronting a pandemic-related hardship.

The proposed rule acknowledges that there are situations in which prolonging initiation of the foreclosure process does not provide any additional borrower protections but instead only puts them in deeper debt, for example:

- borrowers who remain unresponsive despite a servicer’s diligent contact efforts, and
- borrowers for whom a foreclosure avoidance option is unviable.

Allowing initiation of foreclosures in these situations can, in some cases, be beneficial to borrowers either by prompting them to finally engage with their servicer to explore loss mitigation options or by triggering the availability of state-level foreclosure prevention programs.

For these reasons, we recommend that the Bureau exempt from the foreclosure moratorium the following:

- *Unresponsive borrowers.* The Bureau notes that many borrowers may not appreciate the urgency of seeking foreclosure avoidance options because state and federal foreclosure moratoria have been extended multiple times and investors are offering multiple forbearance extensions. We do not believe that the enactment of yet another foreclosure moratorium will impress upon borrowers the need for urgency of action. Initiation of the foreclosure process is sometimes the only way to get an unresponsive borrower to reengage with their servicer. As the Bureau noted, the historically long forbearance periods and

lengthy foreclosure moratoria may have interfered with a borrower's ability to understand and focus on the risk of foreclosure and the urgency of taking steps to address their delinquency. Servicers should be allowed to make the first notice or filing for a foreclosure action when either:

  - The servicer has made three separate and distinct attempts to contact the borrower within 30 days of the end of the borrower's scheduled forbearance period; or
  - The borrower was seriously delinquent (over 120 days) prior to March 1, 2020 and has not requested assistance or responded to servicer contact attempts made in accordance with Regulation X.

- *Borrowers who have been evaluated for all available loss mitigation options on the basis of a complete loss mitigation application and have been deemed ineligible, have declined the proposed loss mitigation option, or have failed to perform on the selected loss mitigation option, including those that took place prior to the effective date of this rule. Requiring servicers to continue devoting resources to borrowers without viable loss mitigation options serves only to divert resources better spent assisting those borrowers who may have a chance of avoiding foreclosure.*
- *Borrowers who consent to foreclosure.* Certain borrowers may not wish to maintain their property until the end of the moratorium. For example, a servicer should be permitted to proceed with foreclosure efforts when a borrower in bankruptcy has filed a statement of intent indicating the property will be surrendered.

- Foreclosures associated with commercial real estate transactions in which the principal residences was taken as additional collateral. The commercial real-estate (CRE) portion of the mortgage should be exempt from the proposed foreclosure moratorium, while still allowing full protection under the moratorium of the borrower's principal residence. The CRE transaction subject to the foreclosure is principally commercial in nature; therefore, consumer protections applicable under Regulation X do not apply.

In addition to creating the exemptions above, the Bureau should:

- Clearly define what constitutes an "abandoned" property, and state that abandoned property is not subject to the foreclosure moratorium. The failure to create a clear definition of "abandoned" will undermine the utility of this exception.

- Clarify that the rule does not apply to accounts that have already been referred to foreclosure, including instances where a servicer made the first notice or filing required by applicable law prior to the initial CDC moratorium.

B. Failure to augment and clarify the scope of the streamlined modification exemption will frustrate the Bureau's goal of reducing hurdles for borrowers to enter into permanent loan modifications.

The Associations appreciate the Bureau's acknowledgment that the existing loss mitigation procedure rules, which were designed to respond to the last decade's housing crisis, do not adequately address borrower protection needs during the pandemic. The Associations are concerned, however, that constraints on the proposed loan modification exemption may limit its availability. To enhance the utility of the streamlined modification exemption, the Bureau should:

- Clarify the limitation in proposed Section 1024.41(c)(2)(vi)(A)(1) that the modification "does not cause the borrower's monthly required principal and interest payment to increase." As currently drafted, it is unclear if this requirement applies only to the principal and interest payment at the time of modification or if it applies for the life of the modified loan. Although some investor guidelines permit borrowers to lock-in a low interest rate for 40 years due to a temporary pandemic-created hardship, other investors do not permit modifications that lock in long term fixed rates. The industry needs flexibility to offer one-step adjustable-rate modifications with appropriate guardrails to prevent payment shock. It is important that the Bureau clarify the duration of the interest rate increase restriction so these adjustable-rate mortgages can be offered to borrowers as a loan modification option.

- Clarify that the late fee limitation of proposed Section 1024.41(c)(2)(vi)(A)(2) applies only to those fees listed and incurred during the period of forbearance and not to late fees or charges from pre-forbearance delinquencies. As the Bureau noted in the preamble to the proposed rule, failure to modify the proposed language will create a conflict with FHA's streamlined modification guidelines. FHA borrowers are among the most at-risk borrowers in the pandemic, and this conflict between Regulation X and FHA guidelines will limit the efficiencies the Bureau hopes to gain by creating this exemption. Mandatory fee waivers should be limited to fees which would have been incurred on or after March 1, 2020. This would achieve the purpose of providing relief to those borrowers impacted by COVID-19 while simultaneously holding borrowers responsible for fees that arose before the COVID-19 pandemic.

- Remove the phrase “or similar charges” from the fee limitations at proposed Section 1024.41(c)(2)(vi)(A)(2). The Bureau has sufficient UDAAP authority to prevent companies from creatively naming fees to get around this fee limitation. Leaving in the term “or similar charges” simply creates uncertainty for both mortgage servicers and loan owners who will be designing loan modification solutions to fit within this exemption. The Associations believe the uncertainty engendered by this language will disincentivize loan owners and servicers from relying on this exemption. Further, the Bureau should clarify pass-through costs are not subject to this waiver requirement.

- Include an exemption from the anti-evasion provision to cover other COVID-19 loss mitigation solutions, including, but not limited to, GSE and agency repayment plans and loan modifications (including those which may result in an increase in original principal and interest amount). These programs could prevent further delinquencies that could result from a modification denial with a full documentation review. These programs would maximize the assistance available to COVID-impacted customers via the streamlined options created by investors and insurers. In addition, borrowers would benefit from being able to receive any COVID loss mitigation solution without needing to provide a complete application. Finally, this exception would allow servicers to provide options to struggling borrowers more efficiently and effectively.

In addition to the above-described specific recommendations for the scope of the streamlined modification, the Associations offer the following related recommendations:

- Clarify that reliance on the streamlined modification exemption is completely voluntary, and that investors are not required to make available loan modifications on the basis of an incomplete loss mitigation application.

- Clarify that the acknowledgment letter timeline begins five business days after a borrower rejects any COVID-related loan modification offer. For example, after some borrower conversations during which a servicer evaluates and offers a COVID-19 loan modification, Regulation X will require the servicer to send an acknowledgment letter within five business days of the conversation. Servicers would not be allowed to wait to see if the borrower accepts the loan modification offer before complying with the acknowledgment letter requirements. It appears that the only time a servicer can forgo the acknowledgment letter requirements is if the borrower is permitted to, and in turn does, accept the loan modification offer on the initial telephone call with the servicer. This interpretation would not be a good outcome for consumers in distress, as they would receive notices that may not pertain to an offer made that is still open for consideration. We

recommend a 30-day window to allow the borrower to respond to the open offer, before sending the acknowledgement letter.

C. The proposed early intervention requirements may result in more borrower confusion while adding unnecessary regulatory burdens.

Mortgage servicers want borrowers to understand their loss mitigation options. Servicers have invested significant energy and resources into making information about forbearance and post-forbearance loss mitigation options available to all borrowers through letters and emails, on their websites, on billing statements, and via telephone and text messages.

The Associations support the objectives of the Bureau's early intervention proposal but are concerned that, as proposed, the requirements could create borrower confusion or frustration. To address these shortcomings, the Associations recommend the following:

- *Remove the proposed requirement of Section 1024.39(e)(1) that the servicer affirmatively ask whether the borrower is experiencing a COVID-19-related hardship. This is unnecessary as servicers are already obligated to determine a reason for default under existing investor/insurer requirements.*
- *Replace the requirements in proposed Section 1024.39(e)(1) and Section 1024.39(e)(2) to list and describe all types of forbearance and post-forbearance options with a generalized requirement that servicers inform borrowers there may be a range of repayment options available to address their current financial situation*. Revising the proposal in this manner will ensure borrowers are aware that there are options available to meet their needs while avoiding scenarios where servicers are providing information that may be irrelevant to borrowers and lead to borrower confusion. This would also be consistent with the current GSE scripting guidance and avoid the need for new scripting and staff training at a time when significant numbers of borrowers will be exiting forbearance. Compliance with the current GSE scripting should be considered compliance with this requirement.

We also urge the Bureau to assist the industry in educating the public that an investor-prescribed loss mitigation "waterfall" is not akin to a menu from which borrowers may pick and choose. This is a widespread impression that is incorrect. Although investors and insurers generally have evaluation criteria for placing borrowers into tailored loss mitigation programs on the basis of the information the borrower provides, their programs are not arranged as consumer choice lists. For instance, a borrower who can make more than the current monthly payment is a candidate for a reinstatement or

repayment plan and does not qualify to receive a deferral or loan modification. A borrower without a substantial pre-COVID delinquency who can resume their prior contractual monthly payments is eligible for a deferral. A borrower who cannot afford their prior monthly payments may be a candidate for a loan modification. However, requiring presentation of a list of "available" loss mitigation options over the phone, may confuse borrowers and lead them to believe they can select any of the disclosed options. Borrowers may become frustrated when they are offered an option based on their individual situation and loan status rather than the one they "chose." Servicers have been successfully informing borrowers of the loss mitigation options available to them throughout the pandemic, and the additional requirements could lead to more borrower confusion and frustration contrary to the Bureau's intent. .

- *Revise proposed Section 1024.39(e)(2) by deleting "during the last live contact made pursuant to paragraph 39(a) of this section …"* Servicers have no way of knowing when the last live contact will be. For borrowers in forbearance programs, we recommend that the Bureau revise this section to (1) require servicers to provide the enumerated information during one live contact that occurs approximately 30 days prior to the scheduled end of the forbearance period, and (2) clarify that this obligation will not apply in the event a borrower voluntarily ends the forbearance period early or remains current on the loan during the period of forbearance.

D. The existing "reasonable diligence" requirements with respect to contacting borrowers nearing the end of their forbearance period offers borrowers sufficient protections while reserving for servicers flexibility to engage in outreach that is most helpful to those borrowers.

Under the existing servicing rules, when a borrower receives a forbearance plan pursuant to an evaluation of an incomplete loss mitigation application and remains delinquent, the servicer is obligated to attempt to contact the borrower toward the end of the forbearance period. The goal of establishing contact is to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation.[2] Many investors, including Fannie Mae and Freddie Mac, require a servicer to begin attempts to contact borrowers no later than 30 days prior to the expiration of the forbearance plan term, and require that the servicer continue outreach attempts until Quality Right Party Contact is achieved, or the forbearance plan term has expired. [3] The Bureau's proposed Comment 1024.41(b)(1)-4.iv specific to COVID-

[2] Comment 1024.41(b)(1)-4.iii.

[3] See, for example, Fannie Mae Lender Letter 2021-02.

related forbearances is largely duplicative of the existing requirement and industry practice, and is therefore unnecessary.

To the extent the Bureau finalizes the rule with this COVID-specific comment, it should clarify that reasonable due diligence requirements may be satisfied via sending a letter. Further, the Bureau should remove the requirement that the servicer must "determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation." The intent behind this proposal, and last June's COVID payment deferral rule, is to empower servicers to offer loss mitigation options on the basis of incomplete loss mitigation applications. The Associations are concerned borrowers will be confused if servicers try, upon contacting borrowers, to evaluate them for a payment deferral or loan modification on the basis of an incomplete application, but then also encourage them to complete a loss mitigation application.

In conclusion, the Associations would like to highlight that we are in alignment with the other financial trade associations representing national mortgage servicing interests, including the Housing Policy Council, Bank Policy Institute, and American Bankers Association. While there are variations and technical differences, we are in alignment that the final rule should:

- Include clear exemptions to the special pre-foreclosure review period to prevent the harm the Proposed Rule seeks to address;
- Clarify the scope of the streamlined modification exemption to reduce hurdles for borrowers; and
- Streamline the proposed early intervention requirements to assure efficient and effective communication with borrowers.

* * *

The Associations welcome the opportunity for further discussions with the Bureau to discuss any of our suggestions or to assist in crafting practical solutions that will protect consumers during periods of quarantine, reduce housing anxiety in the face of sudden job or income loss, and avoid unnecessary foreclosures or loss of homeownership by ensuring that borrowers are aware of the loss mitigation options available to them. Should you have questions or wish to further discuss these issues, please contact Sara Singhas at 202-557-2826 or via email at ssinghas@mba.org or Darnell Peterson at 202-557-2922 or dpeterson@mba.org .

Sincerely,
Mortgage Bankers Association
National Mortgage Servicing Association