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May 10, 2021

Submitted through the Federal eRulemaking Portal: http://www.regulations.gov

Mr. David 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, Regulation X
Docket No. CFPB-2021-0006; RIN 3170-AB07 ("Proposed Rule")

Dear Acting Director Uejio:

Our law firm is headquartered in Pennsylvania specializing in creditors' rights, real estate, and litigation. We practice in all counties and federal districts through Pennsylvania and New Jersey. Our attorneys participate in, and speak at, mortgage industry events and have had industry-related articles published on numerous occasions.

We concur with the well-founded May 7, 2021 comments of the American Legal & Financial Network to the Proposed Rule, which are attached hereto and made a part hereof. As a supplement to those comments, we submit the following.

The Proposed Rule is Unconstitutional on Several Grounds

Moratoria on debt collection activities and secured asset recovery have been implemented only sparingly in this country as an economic stabilization tool during national crises. *See* David C. Wheelock, *Changing the Rules: State Mortgage Foreclosure Moratoria during the Great Depression*, Fed. Reserve Bank of St. Louis Review 569-570 (2008); Edward Vincent Murphy, *Economic Analysis of a Mortgage Foreclosure Moratorium*, CRS Report for Congress 11-15 (2008). Nearly a century ago, the United States Supreme Court upheld state legislation extending the timeframe for redemption of real property from foreclosure or sheriff's sale. *See Home Building and Loan Assoc'n v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934)(holding that such a law enacted in Minnesota was not violative of the U.S. Constitution's contract clause or the due process and equal protection clauses of the Fourteenth Amendment given then-current economic conditions, among other criteria).

In *Blaisdell*, while the U.S. Supreme Court found in favor of the Minnesota legislature, the Supreme Court's decision appears to have been guided, in part, by the requirement that mortgagors "must pay the rental value of the premises as ascertained in judicial proceedings [.]"

78 L. Ed. at 445. Such interim *quid pro quo* or adequate assurance payments ensures that the mortgagee "is not left without compensation for the withholding of possession [.]" *Id*. This point is critical as the Great Depression is regarded as the worst economic crisis in the history of the world. The economic downturn of 2020 has not risen to the level of, and cannot be equated with, the Great Depression.[1] Moreover, homeowners in the early 1930s did not have the benefit of social programs such as welfare, Medicaid, Medicare, unemployment insurance, supplemental unemployment insurance created by the CARES Act[2] and extended through September 2021 by the American Rescue Plan Act of 2021[3], and repeated stimulus payments because such programs simply did not yet exist. Thus, in the early 1930s in the complete absence of social programs and helicopter money policies, mortgagors were required to make some payment during the then-economic crisis. The advent of social programs and bailouts render the *Blaisdell* case anachronistic and factually distinguishable from today's world. The Proposed Rule imposes no payment or other requirements on mortgagors and, consequently, we believe that it cannot withstand constitutional scrutiny under a due process or equal protection challenge in light of the plethora of social programs and "no strings attached" bailouts currently available to mortgagors.

Second, the Proposed Rule constitutes a reimposition of the foreclosure moratorium contained in Section 4022(c)(2) of the CARES Act. Congress did not further extend that sixty-day moratorium, expand it to any loans other than federally backed mortgage loans, or reimpose it. Had Congress desired to do so, only it has that power. It is axiomatic that an administrative agency does not have the same power as Congress. As such, the Proposed Rule is an unconstitutional usurpation of Congress' power to legislate.

<u>The Proposed Rule is a Moral Hazard</u>

The Proposed Rule creates a number of moral hazards. First, mortgagors who are current on their mortgage payments, and otherwise receiving no reward or benefit for their efforts in making mortgage payments timely (often, outright struggling to make these payments timely), may consider strategically defaulting as they would not be subjected to foreclosure until next year. Moreover, once they are subjected to foreclosure, foreclosure defense attorneys are well aware that, even with strategic defaults, they can always contest the foreclosures with frivolous claims and defenses in judicial states (such as Pennsylvania and New Jersey in which we practice) for the ulterior purpose of leveraging a loan modification, principal forgiveness, or some other benefit from foreclosing lenders who may be reluctant to engage in lengthy, protracted, and costly litigation. Practically all of our contested files involve meritless denials of the allegations contained in the foreclosure complaint and boilerplate affirmative defenses unsupported by any facts, forcing foreclosing lenders to bear the attorneys' fees and court costs associated with a motion for summary judgment, which fees and costs are ultimately just passed along to mortgagors' loan accounts anyway.

Second, anecdotally, the undersigned is aware that a portion of mortgagors are not spending any of their government benefits or stimulus funds on housing-related expenses (or saving for such housing-related expenses), but rather, are spending those funds on unnecessary consumer goods, entertainment, leisure, and travel. Such conspicuous spending cannot be dismissed as poor financial planning, it unequivocally indicates that such persons are knowingly and deliberately taking advantage of a situation to the detriment of their creditors. As a utilitarian matter, this

[1] As shown *infra*., federal statistics reflect that the U.S. economy is headed in a positive direction with significant job growth from pre-pandemic time.
[2] Public Law No. 116-136, H.R. 748, 116th Congress (2019-2020).
[3] Public Law No. 117-2, H.R. 1319, 117th Congress (2021-2022).

conspicuous and irresponsible spending on the part of mortgagors should not be permitted to continue.

Third, there are mortgagors currently subject to federal foreclosure moratoria who defaulted well before the COVID-19 pandemic and whose defaults are absolutely not attributable directly or indirectly to the COVID-19 pandemic. RMS estimates that about 20% of its foreclosures currently on moratorium hold fall within such category. These mortgagors have received the benefit of foreclosure moratoria for over one year with no payment or other obligations imposed upon them, which raises a separate constitutional issue as discussed *supra*. For these mortgagors, servicers have likely made, in some instances, several years of escrow and other advances with no clear indication on when they can expect to recover some or all of their losses. In some or all of these cases, we may advise servicers ***to immediately cease making any further tax advances*** on mortgages subject to foreclosure moratoria and, thus, allow such collateral to be listed for county tax sales at which servicers can always purchase the collateral (as an alternative means of acquiring title to the collateral).

The Proposed Rule is Unnecessary as There is No Longer An Economic Crisis

The United States Bureau of Labor Statistics reports as of April 6, 2021 that there were "7.4 million [job openings] on the last business day of February [2021.]" *See* <<https://www.bls.gov/news.release/jolts.nr0.htm>>. The undersigned is aware of many businesses in various sectors in Pennsylvania and Florida, for example, who are unable to hire because their pay rates are not as attractive to the gratuitous levels of unemployment compensation being made available through the CARES Act and American Rescue Plan Act of 2021. The United States Bureau of Labor Statistics also reports as of April 2021 that the "number of unemployed persons [is] 9.8 million [.]" *See* << https://www.bls.gov/news.release/pdf/empsit.pdf>>. Assuming such unemployed persons take all of these available jobs, the net number of unemployed individuals must be adjusted to 2.4 million (9.8 million minus 7.4 million). As there were "5.7 million" persons unemployed in February 2020 (*see id*.), the current economy has actually grown since that time has added 3.3 million jobs (5.7 million minus 2.4 million).

Clearly, the foregoing statistics evidence a rebounding national economy. Given this favorable job outlook, the Proposed Rule is unjustified.

Conclusion

For the foregoing reasons, any further moratorium on foreclosures is unwarranted. Alternatively, if the Proposed Rule is promulgated in some form, the sound recommendations of the American Legal & Financial Network should be adopted.

Thank you.

Very truly yours,
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Attachment, as stated

AMERICAN LEGAL & FINANCIAL NETWORK

20 YEARS REPRESENTING, DEFENDING & EDUCATING AMERICA'S MORTGAGE SERVICING INDUSTRY

May 7, 2021

Submitted through the Federal eRulemaking Portal: http://www.regulations.gov

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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, Regulation X. Docket No. CFPB-2021-0006; RIN 3170-AB07

Dear Acting Director Uejio:

We appreciate the opportunity to submit comments regarding the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed amendments to Regulation X. Many of our member firms/companies are small businesses that have been financially devastated from the extended moratoriums, directly and indirectly affecting over 100,000 jobs. Our organization generally supports the proposals of the Bureau. However, we urge the Bureau to consider our recommendations below, which we feel will benefit many borrowers, as well as the overall economy, while still accomplishing the Bureau's goals.

Background

The American Legal & Financial Network ("ALFN") is the largest non-profit trade association of its kind in the default mortgage servicing industry. Our association is comprised of over 112 law firms & foreclosure trustees who cover all 50 states, and 23 ancillary service providers. Our members' primary business is representing the interests and needs of the default mortgage servicing industry, and providing best of class legal services to their clients. Our law firm membership segment includes smaller boutique firms, litigation firms, commercial practice firms, real estate firms, collection firms and larger multi-practice firms. Many of these firms have received "no objection" approvals from Fannie Mae & Freddie Mac and are AV rated. With a special emphasis on default related legal issues, the majority of our members represent mortgage servicers in foreclosure, bankruptcy, eviction, collections, loss mitigation, litigation and other creditors' rights related legal services.

Our ancillary service provider members include title companies, software companies, process servers and others. The ALFN remains the go-to association for education, advocacy, leadership, events & networking in the default mortgage servicing industry.

It is with this vast experience that we provide the below facts and recommendations, which we feel protect those in need, yet properly address a narrowly defined group of loans.

1) Pre-Pandemic Delinquent Borrowers

At the time the national emergency was declared due to the COVID-19 pandemic, foreclosures were at historically low volumes. In fact, foreclosure volumes were at just 50% of historic averages. Of the 412,000 delinquent borrowers in April 2021, that are not in an active forbearance, 194,000 are pre-pandemic defaults, according to a recent Black Knight report. (https://cdn.blackknightinc.com/wp-content/uploads/2021/04/BKI_MM_Feb2021_Report.pdf).

Many pre-pandemic borrowers in default have not made a mortgage payment in years. These borrowers are taking advantage of the system to the detriment of others, when it is clear the pandemic had no bearing on their default. In all the years these borrowers have not made payments, they have had abundant opportunity to save money for new housing. This fact was understood and contemplated by the Biden administration when, on January 21, 2021, the Homeowner Assistance Fund was created within the American Rescue Plan Act of 2021. Specifically, Section 3206 (c)(1) excludes funding for individuals experiencing financial hardship prior to January 21, 2020. Congress and the Biden administration both understand that there is no logic in providing COVID-19 related assistance to those who clearly did not experience financial hardship as a result of the virus. Moratoriums were originally put in place on March 25, 2020 and were made retroactive to March 18, 2020. Borrowers that were in default prior to March 18, 2020 have already received a windfall of additional time. Providing additional assistance to these borrowers is both illogical and contrary to actions taken by President Biden and Congress.

Recommendation:

Exclude all pre-pandemic defaults, occurring before March 18, 2020, except those that have taken advantage of loss mitigation programs prior to June 30, 2021 from the proposed Reg X actions.

2) Borrowers Unaffected by COVID-19, Directly or Indirectly

As previously stated, extending protections to borrowers who have not been affected by the virus, directly or indirectly, does not advance the Bureau's mission and, in fact, is counterproductive because it sends the wrong message, rewards bad behavior and diverts resources from where they are truly needed. This fact has already been acknowledged by both Congress and the President. It is not only our members, but the general mortgage paying public, lenders, homeowners' associations, neighborhoods, local governments, and municipalities that are all negatively impacted when these bad actors are rewarded. Our members are frequently responding to calls from each of those groups wondering when foreclosure proceedings will recommence. Many borrowers who are planning on being foreclosed upon are not paying association dues, not paying property taxes, are not maintaining their home and are causing blight in otherwise lovely neighborhoods. These borrowers, by and large, are the same borrowers who are not responding to servicer contact. They simply have no intention of saving their homes.

The borrowers that did not suffer any loss of income due to the pandemic have had the full opportunity to save up to reinstate their loans. As Congress and the President recognize, those that have not suffered should not receive assistance. Assistance deservedly belongs to those that have been affected, and only those that have been affected.

Recommendation(s):

Exclude borrowers that cannot demonstrate financial hardship related to the pandemic from the proposed Reg X actions and amend the definition of "financial hardship" as contained in section 1024.31 to the following:

> Financial Hardship shall be defined as applying to those that can demonstrate a financial loss from 2019 to 2020 in an amount greater than 5% for those making less than $90,000.00/year, and 10% for those making more than $90,000.00/year or for couples making more than $150,000/yr. Financial loss can be considered direct, if the borrower lost employment, or indirect if the borrower owned a business that lost revenue due to the Covid 19 pandemic.

3) Reverse Mortgages Where the Borrower is Deceased

The default on most reverse mortgages is the death of the borrower. This default cannot be cured. Death is permanent. Thus, these reverse mortgages primarily fall into two categories: a) situations where the heirs/estate want to sell the property, which they can easily do in the existing home sale market and b) situations where there are no heirs or estate, or the heirs do not want the property. In the first situation, the heirs are granted at least 6 months after the death of the borrower to pay the loan in full and most estates have no interest in remaining open longer than they need to be open. Thus, extending the moratorium on these loans is not needed. In the second situation, the delay in foreclosure is oftentimes a burden on the heirs and/or neighbors who feel compelled to maintain the property, pay taxes and pay HOA dues on a home they do not want to keep. At the same time, the servicer is continuing to pay for inspections and winterizations on a property that is likely upside down (negative equity) and the interest is accruing so rapidly that the total debt amount will never be recovered through the property. Allowing such properties to sit and languish is a lose-lose proposition for all parties involved, namely grieving heirs and their servicer.

Recommendation:

Exclude reverse mortgages where the borrower is deceased from the proposed Reg X actions.

4) Borrowers Who are Unresponsive to Servicer Outreach

An often ignored or misunderstood fact is that many borrowers will simply disregard loan or mortgage notices until there is a foreclosure action pending, at which time such borrowers finally initiate contact. One lesson learned during the Great Recession is that delinquent borrowers are far more likely to contact a law firm that has or is intending to file a foreclosure, than they are to contact the servicer or lender. Our association members are and were successful in making contact with delinquent borrowers and bridging a communication gap between servicers and borrowers. Whether it is because our law firm members are "boots on the ground," and are local or because the initiation of a foreclosure resonates more than pre-foreclosure communications, the facts demonstrate that many borrowers that are unresponsive to servicers respond to law firms. Once proceedings are commenced, many states have mandatory mediation procedures, which create yet another loss mitigation opportunity for borrowers. The foreclosure process plays an important role in loss mitigation, and the Bureau should allow the system to fulfill that role if all previous efforts by the servicers to contact those borrowers to date have failed.

Recommendation(s):

Initially exclude all unresponsive borrowers (defined as borrowers who have not responded to three (3) servicer contacts in a sixty (60) day period) from the Bureau's proposed Reg X actions. However, once a foreclosure is started, if a previously unresponsive delinquent borrower makes contact, an automatic 90-day loss mitigation hold should be placed on that loan. If the borrower is, in good faith, attempting to obtain a positive loss mitigation result, another 90-day hold should be placed on the loan. All such borrowers are still subject to the proposed definition of "Financial Hardship" listed in recommendation #2.

5) The Datum Does Not Support the View That There Will Be a Wave of Foreclosure Sales

The Bureau refers to the possibility of "millions of foreclosures" if the moratorium is not extended. However, the data contradict those numbers. A recent report predicts 500,000-700,000 foreclosures once the moratoriums end. Auction.com's chief economist, Darren Blomquist, predicts 1.1 million foreclosures over two years post- moratorium. Dividing the 1.1 million over two years predicted by Auction.com would equal the historical average, not a "wave of foreclosures."

Additionally, the housing market will stabilize, and inventory will be created. Borrowers who face foreclosure will overwhelmingly be able to sell their home before the foreclosure sale is complete, allowing them to walk away with money in their pockets. A recent RealtyTrac report indicated that 80% of homes have at least 20% equity, providing a perfect exit strategy from a home a borrower simply cannot afford. The report is a reminder that a foreclosure does not equal homelessness.

Moreover, ATTOM Data Solutions recently released a report showing that the average foreclosure timeline is 857 days. (https://www.attomdata.com/news/market-trends/foreclosures/attom-data-solutions-2020-year-end-u-s-foreclosure-market-report/). ATTOM Data also reported that of the 1.4 million vacant properties in the U.S., only 175,414 are currently in some state of foreclosure. (With Moratoria in Place, 'Zombie' Properties Fade - MBA Newslink). The fact is that delinquent borrowers will have ample opportunity to access the equity in their homes. Unlike the Great Recession, there will not be a "wave" of foreclosure sales, but instead an easing of the current housing market, providing most a perfect opportunity for struggling borrowers to move into something more affordable. Borrowers that will not have such financial stability upon exiting are the homeowners that the Bureau should focus its full resources upon.

Finally, Black Knight recently issued its March Mortgage Monitor Report revealing several important data points. First, that 217,000 homeowners became past due on their mortgages in March, the lowest such delinquency inflow of any month on record. Second, that cures spiked in March, likely linked to several economy driven factors (new jobs and stimulus checks). This spike in cures resulted in the second largest delinquency rate decline ever recorded. Black Knight Data & Analytics President, Ben Graboske, said that "[n]ot only did March see the largest single month improvement in delinquencies in 11 years, but all indications suggest more is yet to come."

The data demonstrate that drastic moratoriums are not necessary and that the market is sufficiently dealing with delinquencies with borrowers curing, borrowers who do not cure having sufficient time and opportunity to sell, leaving a much smaller number of foreclosures than a "wave."

Further, we believe that our recommendations regarding reducing the number of loans included in any moratorium, if implemented, will spread out foreclosure starts, further reducing any potential foreclosure "tidal wave". Like the Bureau, our association, members, and servicer clients would like to prevent a wave by creating a more staggered flow of the foreclosures that cannot be avoided. By implementing the above cited exclusions from the moratorium extension, the foreclosures that will inevitably happen will be spread over time.

6) Constitutionality of Proposals for Moratorium Including Privately Held Mortgages and Law Firms Handling Evictions

The ALFN, as an association, is aware that the Bureau believes it has a legal right to proceed against privately held mortgage companies and servicers pursuant to RESPA in the same manner it does against servicers of government backed loans. Several of our members have been gearing up for a constitutional challenge to such action for over a year. The research produced by these members indicates that a governmental entity cannot simply interfere with a private contract because it determines it suits its purpose. Thus, including private lenders in the proposed moratorium will likely lead to a constitutional challenge as it is an overreach of the Bureau's authority.

Similarly, attempting to regulate attorneys handling evictions is also an overreach of the Bureau's authority. Attorneys handling foreclosures are, by and large, not considered debt collectors, and are therefore not subject to the FDCPA. Additionally, evictions, wherein the owner of the property is merely seeking an order for possession, is not generally considered "debt collection." Where the Bureau desires to impose requirements on lawyers handling evictions, it should be noted that, while some attorneys may be considered debt collectors and therefore regulated under FDCPA, the proposed rule can only achieve partial regulation at best (i.e., only when the lawyer is, on behalf of his or her client seeking a monetary judgment in addition to an order for possession). Since the Bureau purports to derive its rule making authority from the FDCPA, attempting to regulate all lawyers handling evictions including possessory actions oversteps the Bureau's authority. We feel that these attempts at regulation will ultimately be held to be unconstitutional just as the CDC moratorium.

By no means do we intend these statements to be perceived as a threat to the Bureau. We are simply informing the Bureau to expect legal actions challenging the constitutionality of the Bureau's actions if private lenders, many of whom are small businesses that are also struggling due to the pandemic, are included in the moratorium and if the Bureau proceeds with the eviction restrictions as drafted. Proceeding against private lenders, even if temporarily successful, will likely lead to significant financial harm to the Bureau when impacted privately held lenders challenge the rule. We estimate that a six-month delay on that group of loans will exceed $150 Billion in private lender losses, not including the anticipated loss resulting from not being able to sell into the current market environment. Additionally, we believe that the desired proposal to charge lawyers with additional documentation and fact verification, that is not well defined and leaves far too much to interpretation in the eviction process will fail on constitutional grounds due to the Bureau's lack of jurisdiction. The Bureau is part of the executive branch, yet lawyers are subject to the jurisdiction of the judicial branch. It makes more sense for the Bureau to focus on borrowers that truly need help, than for it to get involved in something that will publicly fail.

The Bureau's desire to have every borrower treated equally is noble, but the proposals to try and achieve this goal are unconstitutional, overbroad, and will be met with resistance. As the CDC has learned, in what is now a very public display of overreaching, the government does not have the power to unreasonably impact interstate commerce.

Recommendation(s):

Re-evaluate the Bureau's position regarding the application of any moratorium to private lenders, including "mom and pop" lenders. Also re-evaluate the Bureau's proposal to impose "Legal" requirements on lawyers in the eviction process.

Conclusion

It is for all of the above reasons that the ALFN strongly urges the Bureau to implement our recommendations as follows:

1. Exclude all pre-pandemic defaults, occurring before March 18, 2020, except those that have taken advantage of loss mitigation programs prior to June 30, 2021 from the proposed Reg X actions.
2. Exclude borrowers that cannot demonstrate financial hardship related to the pandemic from the proposed Reg X actions and amend the definition of "financial hardship" as described above.
3. Exclude reverse mortgages where the borrower is deceased from the proposed Reg X actions.
4. Initially exclude all unresponsive borrowers (defined as borrowers who have not responded to three (3) servicer contacts in a sixty (60) day period) from the Bureau's proposed Reg X actions. However, once a foreclosure is started, if a previously unresponsive delinquent borrower makes contact, an automatic 90-day loss mitigation

hold should be placed on that loan. If the borrower is, in good faith, attempting to obtain a positive loss mitigation result, another 90-day hold should be placed on the loan.

5. Evaluate the Bureau's position regarding the application of any moratorium to private lenders, including "mom and pop" lenders. Also re-evaluate the Bureau's proposal to impose "Legal" requirements on law firms in the eviction process.

Thank you for the opportunity to be heard and for your careful consideration.

Best regards,

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