America's Credit Unions

September 9, 2024

Residential Mortgage Fees Assessment
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Docket No. CFPB-2024-0024 or RIN 3170-AB04

Dear Sir or Madam:

On behalf of America's Credit Unions, I am writing in response to the Consumer Financial Protection Bureau's (Bureau or CFPB) Proposed Rule, "Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties (Regulation X)" (Proposal or Rule)[1]. America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their over 140 million members nationwide. America's Credit Unions appreciates the opportunity to comment on the rule.

The Proposal eliminates existing processes and systems that mortgage servicers have complied with for years. While the Bureau asserts the Proposal increases flexibility and the ability to serve borrowers in economic straits, the lack of direction invites potential inconsistent treatment of borrowers by different servicers and increased risk to servicers in the forms of regulatory uncertainty and advantageous protections for bad actors. Due to lack of clear direction, servicers may interpret requirements differently and adopt differing standards. America's Credit Unions requests the CFPB exempt all credit unions from the language access requirements of this rule as their field of membership requirement differentiates them from other financial institutions and makes application of these requirements inappropriately burdensome. In addition, America's Credit Unions requests that the CFPB should provide more clarity regarding several key parts of the rule. The loss mitigation cycle proposals require additional details to eliminate uncertainty and unnecessary risk and facilitate compliance with the rule. The prohibition against fees and LEP requirements likewise require more specificity. Finally, the Bureau should provide guidance to ensure the Rule aligns with guidance from other agencies, including the National Credit Union Administration (NCUA).

General Comments

Credit unions share the Bureau's goals of expanding home ownership and keeping people in their homes when they experience financial distress. Most credit unions offer unique products developed for specific borrowers.

[1] https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-nprm-proposed-rule_2024-07.pdf

All credit unions exhibit an unwavering dedication to serving members in their communities, including those who are the most vulnerable and those in underserved areas. Research shows that low-income and underbanked areas are more likely to be served by credit unions. In February 2024, the Federal Reserve Bank of Philadelphia released a report, "U.S. Bank Branch Closures and Banking Deserts."[2] Census tracts without a financial institution branch rose 6 percent since 2019, while bank branch closures doubled at the same time. Banks with $10 billion or more in assets created nearly two-thirds (62 percent) of new banking deserts through branch closures. Credit unions were able to "cure" these deserts in about 36 percent of all instances by opening a branch in a tract where one had not previously existed.[3] Credit unions also only closed branches that created a banking desert 8 percent of the time compared to 45 percent for very large banks (with $50 billion or more in assets), 17 percent for large banks (between $10 billion and $50 billion in assets), and 30 percent for community banks (under $10 billion in assets).[4]

Credit unions are more likely to serve consumers who are living hand-to-mouth (described as households with net liquid assets of less than two weeks' income). More specifically, 38.9 percent of households where a credit union is the primary financial institution can be described as living hand-to-mouth, compared to 35.5 percent of households where a bank is the primary financial institution.[5] These are the borrowers who are most likely unable to pay their mortgage when a job loss or other financial emergency occurs.

The Proposed Loss Mitigation Cycle is Not Clearly Defined

The Rule proposes an amorphous loss mitigation cycle that starts with a borrower's request for loss mitigation assistance and ends when the loan is brought current, a determination is made that no more loss mitigation options are available, or the borrower has avoided contact for ninety days. Currently, the loss mitigation cycle commences when a borrower submits a loss mitigation application. A notification is provided which acknowledges receipt of the application informs the members whether the application is complete or incomplete. In the case that the application is incomplete, the acknowledgment notice also informs the member of any documents or information necessary to complete the application. They also provide clear guidance to members including next steps and timelines. A complete application gives the servicer a full set of facts about the borrower's situation and allows for an accurate review of loss mitigation options that would be appropriate to offer the borrower.

The newly proposed loss mitigation cycle allows a borrower to "simply ask for mortgage relief or otherwise indicate they need mitigation assistance" without submission of an application or

[2] "U.S. Bank Branch Closures and Banking Deserts," Federal Reserve Bank of Philadelphia (Feb. 2024), https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/banking-deserts-report-feb-2024.pdf.
[3] *Id.* at 14.
[4] *Id.*
[5] America's Credit Unions calculations using data from Federal Reserve 2022 Survey of Consumer Finances, *available at* https://www.federalreserve.gov/econres/scfindex.htm.

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supporting documentation.[6] Further, the Rule indicates the CFPB "intends for the definition of mortgage relief to be construed broadly."[7] This allows almost any communication to initiate the loss mitigation cycle and suspend the servicer's ability proceed with foreclosure. It does not require that the lender be provided with any information about the borrower or their ability to repay. However, without this information, lenders are unable to evaluate a borrower's suitability for various loss mitigation programs.

Similarly, the end of the loss mitigation cycle is equally unstructured. The rule proposes one of three end points. The first is when the loan is brought current, or when the borrower has caught up with the agreed-upon payments. The second is when all loss mitigation options are exhausted. Given that the borrower is not required to provide any information to the servicer at the start of the loss mitigation cycle, it may be impossible for the servicer to determine whether all options are exhausted. A borrower must submit a minimum amount of information to determine whether loss mitigation options are appropriate before it can be determined that they are exhausted. The proposed rule does not include a timeline for this information. Finally, the last end point is when a lender has not been able to communicate with a borrower for 90 days. This allows for a process that stretches on for months at a time in which a lender can do nothing and the borrower is required to do no more than make contact once every 90 days.

No one wishes to be in the position of being unable to pay their mortgage. However, the borrower must show a good faith intent to work with the lender to be granted protection from foreclosure. The proposed rule offers protections for borrowers but no safeguards for lenders. A borrower acting in bad faith could take advantage of these relaxed requirements to stop making payments, provide little to no information, and contact the servicer once every 90 days with crumbs of information to prevent the loss mitigation cycle from ending. This could potentially create conflict with state rules regarding foreclosure proceedings. For instance, in December 2022, New York enacted a new law that requires foreclosures to take place within six years from the date the servicer first accelerates the loan. A bad actor determined to run out the clock on that requirement could find ways to delay the loss mitigation cycle detailed in the Rule to their own advantage.

The Proposed Rule Does Not Align with NCUA Guidance

The Rule does not include guidance regarding what information servicers are permitted to request from members in terms of modifications, specifically regarding income verification. A rule issued by the NCUA on June 30, 2021, states that, "Modifications of loans that result in capitalization of unpaid interest are appropriate only when a borrower has the ability to repay the debt."[8] Some modification types do not have trials and servicers collect income verification for those. Members often prefer modifications without trials to get back on track more quickly, incur less fees, and capitalize less delinquent interest, which costs less in the long-term.

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[6] Id, 29.
[7] Id, 30.
[8] Federal Register: Capitalization of Interest in Connection With Loan Workouts and Modifications

Additionally, the Rule does not indicate whether it aligns with other government or government-sponsored housing programs that require loan modification programs based on the member's ability to repay the loan under the modified terms. Providing a loan modification that is consistent with the ability to repay is essential to provide long-term and sustainable assistance to our members.

More Clarity is Necessary Regarding Fees

The changes the Proposal makes regarding fees is also ambiguous and too broad. The Rule states that it would, "prohibit fees beyond the amount scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract beginning when a borrower requests loss mitigation assistance and continuing throughout a loss mitigation review cycle. This prohibition would encompass both amounts typically imposed on a borrower's account directly by the servicer, such as late charges and stop payment fees, as well as payments to third party companies for delinquency-related services, such as property inspections."

This language potentially encompasses a broad spectrum of fees from those mentioned to foreclosure attorney fees to delinquent interest. We request that the Bureau provide additional clarity on which fees are prohibited. If a lender is not permitted to charge fees to move forward with foreclosure and is even expected to absorb delinquent interest, mortgage products will fall in value from uneconomical to untenable. We further request clarity regarding at which point the "non-accrual" process is to start. If it is at the request for assistance which triggers the loss mitigation cycle, the servicer's hands are tied regarding mitigation of its own losses.

Language Access Requirements are Too Burdensome, Create Servicer Risks, and May Result in Inconsistent Information Being Provided to Borrowers

While we support the goal of ensuring that borrowers understand the potential implications of default and the availability of loss mitigation programs, the Bureau's lack of translation guidance creates significant risks to lenders and may provide with inconsistent and potentially confusing information to borrowers. The language access requirements in the Proposed Rule are overly broad, and place an unnecessary burden and risk on servicers, and may result in inconsistent information being provided to borrowers in translated notices and interpretation services.

The communications falling under this Proposal include the following: 1) written early intervention notices, 2) the proposed written notices for borrowers whose forbearances will end soon, and 3) written notices regarding loss mitigation, as well as any content changes or additions set forth in the proposal. The proposal requires those communications automatically be sent in Spanish, as well as English to all borrowers. It also proposes that, upon borrower request, the servicer should provide translations of these documents in a minimum of five additional servicer-selected languages and disclose the availability of these additional translations. Upon the borrower's request, servicers are also required, , to establish a process for providing interpretation services before or within a reasonable time after the request to be able to translate conversations between the servicer personnel and the borrower in real-time.

Servicers should select the five languages based on an assessment of those languages most used by a significant majority of its collective non-Spanish speaking borrowers with limited English proficiency and servicers should further periodically assess the continued predominance of the five languages and adjust the selected five languages accordingly. The Rule does not provide guidance as to how often to reevaluate these language selections.

To ensure borrowers are aware of this benefit, the proposal requires servicers to provide brief disclosure statement, accurately translated into each of the five selected languages, in the English version of the specified written communications. These statements would identify the availability of translations in those five languages and inform the borrower how to request those translations or interpretation services. Finally, the proposal would require a servicer to comply with the translation and interpretation service requirements for instances where a borrower received marketing for their mortgage loan in a language other than English, even if the language is not one of the five selected by the servicer.

The Bureau chose not to include translated model forms or disclosure language for the specified written communications, placing the burden of translation on the servicers. Without model forms or prescribed disclosure language, this can lead to a variety of translations and create significant confusion for borrowers. For example, the Bureau offers no guidance on whether servicers should consider inconsistencies between dialects and country of origin when establishing the Spanish translations. The Bureau previously provided Spanish translations of Early Intervention Written Notice Model Clauses in July 2021. While those translations did not qualify for safe harbor under RESPA, they provided a useful reference point and framework for reasonable translation options.[9]

In addition to the written translations, servicers must have a translator service available upon request for live discussions between borrowers and servicer personnel. There is insufficient guidance for this requirement as well and the cost of finding a translator service or keeping numerous translators on retainer is another burden to the servicer. This service could come at a substantial expense and may not be utilized often, especially for credit unions with more homogenous fields of membership. Servicers will also bear significant expense and operational challenges in establishing quality control for their various translations, including identification and implementation of internal controls or training for the translator services per CFPB accuracy requirements.

Of significant concern is that the Rule states that, “Failure to provide accurate translations or interpretations would result in a violation of not only this proposed requirement, but also the underlying requirements.” This could trigger a private right of action for the borrower if the content of the translation is incorrect and trigger supervisory concerns under Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) as well as Fair Servicing concerns. Without model forms

[9] https://files.consumerfinance.gov/f/documents/cfpb_mortgage_servicing_early_intervention_model_clauses_translations_2021-07.pdf

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or translated model clauses and disclosures, the risk of violation due to improper translation is high and subjective. The CFPB has recognized that there is no nationally recognized organization offering financial translator certification and the general availability for such translators is low. Yet, in order to provide accurate translations in languages other than English without model forms or proscribed translated disclosures servicers need such an organization to ensure accurate translation in order to avoid violations of the underlying requirement and the proposed rules, as well as to avoid private causes of action.

Also of significant concern are language access requirements that require servicers select five languages that "address the needs of at least a significant majority of their non-Spanish speaking borrowers with limited English proficiency." The Bureau provides no specific guidance as to how servicers should determine the predominate five languages other than English or Spanish. Most credit union servicers do not collect language preference information for their members during the loss mitigation process and would have to survey their membership to determine what other languages are spoken other than English or Spanish.

Credit unions, however, are restricted in the borrowers they can service, and can only lend to those who fall within a field of membership. A field of membership may be based on community, profession, heritage, or other common bond. For example, a credit union built around a Ukrainian community may find it appropriate to provide notices in the Ukrainian language but may have no other borrowers that rely on Spanish or other languages. Therefore, the most appropriate course of action would be to exclude all credit unions from this proposed rule based on their unique structure.

Credit unions, for reasons discussed above, are unique financial institutions with specific fields of membership and should be exempt from the expanded language access requirements. For other services, the CFPB should consider discarding its arbitrary assignment of five languages and establish a threshold system where notices may be requested only in alternative languages that rise to a certain percentage of a lender's business. The CFPB should include detailed instructions for lenders regarding how to measure what percentage of their borrowers speak a language other than English at home.

The Small Servicer Exemption Is Insufficient for Credit Unions

The Regulation Z exemption for small servicers is insufficient and does not account for the unique position of the credit union industry. Regulation Z § 1026.41(e)(4)(ii)[10] defines small servicers as those who, along with their affiliates, service 5,000 or fewer mortgage loans per year.

[10] 12 USC § 1026.41(e)(4)(ii) https://www.ecfr.gov/current/title-12/chapter-X/part-1026/subpart-E/section-1026.41

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Call report data indicates that approximately 315 credit unions will not be exempted by Regulation Z.[11] Further, using the measure of number of loans serviced disincentivizes those lenders approaching the limit from continuing to make and service more loans. A lender on the cusp may choose not to make additional loans that would eliminate their small servicer exemption or choose to make only loans that can be resold on the secondary market. Credit unions are often in the best position to work with their members on loan modifications and servicing the loans they originate keeps the borrower engaged in the financial relationship with their member. That is why many credit unions choose to retain servicing rights on the loans they sell into the secondary market. However, this rule could change that dynamic and risk the relationship-based servicing model currently in place for many credit unions and their borrowers. When borrowers take out a mortgage with a credit union, that loan is typically an extension of the banking relationship that has previously been established. That relationship encourages the borrower to reach out in the event of economic distress. If that relationship is severed by sale of the loan servicing, the borrower becomes just another loan number in a large serving organization.

Conclusion

America's Credit Unions appreciates the opportunity to comment on the proposed changes to Regulation X. As set forth above, the proposed changes would burden lenders with extended loss mitigation cycles, cause confusion regarding the beginning and end of those cycles, open lenders to risk due to lack of guidance, and arduous data collection and language requirements that are not appropriate for credit unions' field of membership constraints.

If you have any questions or concerns, please do not hesitate to contact me at asmith@AmericasCreditUnions.org or (703) 842-2803.

Sincerely,

Amanda L. Smith
Regulatory Advocacy Senior Counsel

[11] NCUA Call Report data – update cite

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