Comments submitted by the
Center for Responsible Lending,[1]
Consumer Federation of America,[2] and
Center for American Progress[3]

to the Consumer Financial Protection Bureau
RE: 2012 Real Estate Settlement Procedures Act (Regulation X)
Mortgage Servicing Proposal

Docket No. CFPB-2012-0034
RIN 3170-AA14

October 9, 2012

Thank you for the opportunity to submit comments concerning the Consumer Financial Protection Bureau's (CFPB) proposed rulemaking on mortgage servicing standards under the Real Estate Settlement Procedures Act (RESPA).

Overview

The ongoing foreclosure crisis has made plain the need for meaningful mortgage servicing standards that apply to mortgages and servicers across the country. Both policymakers and homeowners alike are now familiar with a range of mortgage servicing shortcomings that have made it difficult for borrowers to obtain loan modifications and other loss mitigation options. Consumer protection for servicing is particularly important because, even though borrowers can choose their lender, they cannot control who services their loan. One of the challenges raised by borrowers and advocates has been the practice

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[1] The Center for Responsible Lending (CRL) is a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses and nonprofits and serves more than 80,000 mostly low-income families through 25 retail credit union branches. Additionally, Self-Help has served as master servicer for $387 million of home loans originated by its two credit unions and $4.6 billion in loans to low-income families that Self-Help purchased from lenders across the country under Self-Help's home loan secondary market program. CRL discussed servicing standards with Self-Help servicing staff in the process of drafting this comment.
[2] The Consumer Federation of America is an association of nearly 280 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.
[3] The Center for American Progress (CAP), founded in 2003, is a progressive, nonpartisan think tank dedicated to improving the lives of Americans through ideas and action.

where servicers move the foreclosure process forward while also evaluating loss mitigation applications from the borrower at the same time. In some instances, servicers have gone through with the foreclosure sale before the borrower has had an opportunity to be fully considered for a modification making their loan affordable. The servicing standards proposed by the CFPB in this rulemaking are an opportunity to establish process requirements that prevent this harmful practice and ensure that servicers review loss mitigation applications in a timely, efficient and comprehensive manner.

Preventing foreclosures where possible through loss mitigation is not only obviously helpful for borrowers, but it is also critical to stabilizing neighborhoods and the broader housing market, as well as to investors. A forthcoming CRL analysis shows the negative impact of the estimated 10.9 million properties that entered the foreclosure process between 2007 and 2011[4] on the home equity of neighboring families. [5] Specifically, families living in close proximity to these foreclosures have already lost or will lose up to $1.95 trillion as a result of the "spillover" impact of foreclosures on their property values.[6] Additionally, CRL's forthcoming analysis shows that a majority of this lost property value will occur in communities of color.[7] These costs are only one measure showing the importance of preventing unnecessary foreclosures.

While the mortgage servicing industry has made some improvements during the last five years, there is still a need for uniform national servicing standards, including loss mitigation provisions. A recent study looked at how the Home Affordable Modification Program (HAMP) impacted servicer behavior in completing loan modifications and stated that "the ability of government to quickly induce changes in behavior of large intermediaries [servicers] through financial incentive is limited."[8] The limitation of HAMP financial incentives to improve servicing practices underscores the importance of national mortgage servicing standards promulgated by the CFPB. Beyond HAMP, several initiatives have put in place improved servicing standards, including loss mitigation review procedures, but these also fall short of promulgated standards established by a CFPB rulemaking. For example, protections required by the Attorney General settlement[9] and parts of the California Homeowners Bill of Rights[10] are temporary and will time out in several years. In addition, the Federal Housing Finance Agency (FHFA) established a servicing alignment initiative for mortgages owned or guaranteed by Fannie Mae and Freddie Mac, but

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[4] CRL calculation based on MBA National Delinquency Survey, scaled to reflect market coverage. Per MBA's claims, we assume 85% market coverage for 2007q1-2010q2 and 88% coverage for 2010q3 and after.

[5] Bocian, Smith and Li, *There Goes the Neighborhood: The Spillover Costs of Foreclosures*, Center for Responsible Lending (Forthcoming, 2012).

[6] *Id*.

[7] *Id*.

[8] Agarwal, Amromin, Ben-David, Chomsisengphet, Piskorski and Seru, *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program,* at 1 (August 2012) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138314).

[9] *See* National Mortgage Settlement, The United States Department of Justice, National Mortgage Settlement, http://www.justice.gov/ust/eo/public_affairs/consumer_info/nms/index.htm; http://nationalmortgagesettlement.com; Office of Mortgage Settlement Oversight, https://www.mortgageoversight.com/.

[10] California Assembly Bill No. 278 and Senate Bill No. 900 [hereinafter "California Homeowner Bill of Rights"] (Approved by Governor July 11, 2012. Filed with Secretary of State July 11, 2012).

these requirements are subject to change in a non-rulemaking process and do not apply to all mortgages. All of these factors point toward the need for comprehensive and continuing national servicing standards.

In this comment letter, we make the following recommendations concerning the CFPB's error resolution, early intervention and loss mitigation standards:

- **#1: Align mortgage servicing standards with existing servicer best practices that benefit borrowers.**
- **#2: Require loss mitigation review process & loan modification options for most servicers.**
- **#3: Require early loss mitigation outreach for delinquent borrowers.**
- **#4: Include requirements for servicers to timely process complete applications, to work with borrowers who submit incomplete applications, to disclose specific reasons for a denied application, and to offer an appeals process.**
- **#5: Prohibit referring loans to foreclosure while considering a loss mitigation application submitted in the pre-referral time period.**
- **#6: Post-foreclosure referral, prohibit servicers from advancing the foreclosure process while evaluating a complete application.**
- **#7: Complete application deadline should be 14 days – not 90 days – before a scheduled foreclosure sale.**

The CFPB has undertaken an important task by including loss mitigation standards in the broader mortgage servicing standards proposed in this rulemaking. We encourage the CFPB to incorporate the below recommendations into the final rulemaking on loss mitigation standards, whether they are either issued with the rest of the servicing requirements by January 2013 or separately finalized later.

Recommendations

#1: Align mortgage servicing standards with existing best practices that benefit borrowers.

Establishing national mortgage servicing standards is an opportunity to further improve the mortgage servicing industry and to ensure that borrowers receive full and fair consideration for a loan modification or other loss mitigation alternatives instead of losing their homes unnecessarily to foreclosure. The fact is that millions of borrowers will continue to face the threat of foreclosure in the future.[11] Robust national servicing standards will ensure fairness and will make the closing years of the

[11] *See*, Bocian, Li, and Quercia, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, (November 2011) (available at http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf).

crisis easier for borrowers to navigate than the beginning years of the crisis. These standards will also continue to benefit borrowers once the housing market has regained its footing and fewer are in delinquency and face the possibility of foreclosure.

As the CFPB finalizes its mortgage servicing rulemaking, we encourage the Bureau to adopt existing servicer practices that benefit borrowers and mortgage holders. As a result of new guidelines, enforcement actions, settlements, and voluntary efforts,[12] the mortgage servicing industry has made improvements during the five years of the foreclosure crisis. While still not perfect, the standards required by the Federal Housing Finance Agency for mortgages purchased or securitized by the GSEs and the Attorney General settlement with the five largest servicers are in place for a large portion of the mortgage servicing industry and provide borrower protections. Voluntary or not, improved practices benefitting borrowers and investors have set a new bar for the servicing industry. These existing standards should be incorporated into – and improved upon where necessary – the loss mitigation standards proposed by the Bureau in this rulemaking.

Specifically, the CFPB's rulemaking should follow industry practice and establish process requirements both *before* a borrower is referred to foreclosure and *after* this point. Pre-foreclosure referral requirements should be measured based on the number of days the borrower has been delinquent and should prevent a foreclosure referral while the servicer evaluates a loss mitigation application. Post-foreclosure referral requirements should also prohibit the foreclosure process, in both judicial and non-judicial jurisdictions, from moving forward while a servicer evaluates an application, particularly before going to sale. These requirements should also set a complete application deadline of 14 days before a scheduled foreclosure sale instead of the 90 day deadline allowed in the CFPB proposal.

The CFPB should adopt this loss mitigation framework that hinges on whether a borrower is pre- or post-foreclosure referral because it is beneficial for borrowers and is widely accepted by the industry, thus posing minimal compliance burdens for the vast majority of servicers.[13]

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[12] *See* Office of the Comptroller of the Currency, *Press Release* "*OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices*", (April 13, 2011) (available at http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html); Federal Reserve Board, *Press Release*, (April 13, 2011) (available at http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm); Federal Housing Finance Agency, *Press Release* "*Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages Updated; Framework to Include Servicer Incentives and Penalties*", (April 28, 2011) (available at http://www.fhfa.gov/webfiles/21190/SAI42811.pdf); United States Department of Justice, *Press Release* "*Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses; $25 Billion Agreement Provides Homeowner Relief & New Protections, Stops Abuses*," (February 9, 2012) (available at http://www.justice.gov/opa/pr/2012/February/12-ag-186.html).

[13] *See e.g.*, United States of America v. Bank of America Corp. *et al*., Wells Fargo Bank, N.A. Consent Judgment (hereinafter "AG Settlement Consent Judgment"), Exhibit A, § IV (April 4, 2012) (available at https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_WellsFargo-4-11-12.pdf); Fannie Mae, *Fannie Mae Single Family 2012 Servicing Guide* (hereinafter "Fannie Mae Servicing Guide"), Part VIII, (March 14, 2012) (available at https://www.efanniemae.com/sf/guides/ssg/svcg/svc031412.pdf).

By failing to put in place borrower protections both before and after foreclosure referral, the CFPB's rulemaking runs the risk of resulting in confusion for borrowers and slowing down the loss mitigation process. As proposed, the rulemaking requires early intervention with delinquent borrowers and establishes an application deadline that is measured at 90 days before a foreclosure sale. This results in a foreclosure timeline with outreach requirements at the beginning of delinquency, a hard to define application deadline, and nothing related to loss mitigation in the middle. The right course of action is to use the point at which a borrower is referred to foreclosure as a pivot point between two different stages of borrower protections. Such a structure is forward looking and encourages action steps as early as possible following the on-set of difficulty, when modifications have proven most effective. This is preferable to a backward looking model using an estimated 90-day before foreclosure sale deadline that lacks the same incentives for early action.

#2: Require loss mitigation review process and loan modification options for most servicers.

All servicers should be in the business of mitigating losses instead of enhancing them. As a result, the CFPB's rulemaking should reflect this reality by requiring servicers to offer loss mitigation options to borrowers and to follow the loss mitigation process steps detailed in the rulemaking. The CFPB's current proposal binds only those servicers already offering loss mitigation to the process requirements proposed in the rulemaking. Practically speaking, the vast majority of servicers already offer loss mitigation options to borrowers and will, therefore, be bound to the CFPB's process requirements. However, by not requiring loss mitigation, the CFPB may appear to suggest that servicers can fulfill their obligations without offering borrowers loss mitigation options. This would run counter to the lessons learned during the foreclosure crisis, and this rulemaking should, instead, require servicers to offer loss mitigation options to borrowers.

The Bureau's final rule on loss mitigation should also clarify that servicers must include loan modifications that reduce payments to an affordable level as one of the loss mitigation options generally available to borrowers. Servicers should further be required to offer loss mitigation to borrowers where it meets the servicers' standards and requirements; in other words, servicers should be required to follow their own loss mitigation guidelines and not apply them arbitrarily.

Requiring the availability of loan modifications is not a requirement to give every borrower a loan modification. Instead, it codifies the best practice learned during the foreclosure crisis that a loan modification is frequently the best option both to help homeowners stay in their homes and investors to avoid the costs associated with unnecessary foreclosures.[14] Requiring loan modifications as one tool in the loss mitigation toolbox preserves this lesson for the post-foreclosure crisis housing market.

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[14] *See generally* Goodman, Yang, Ashworth, and Landy, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, Submitted to the Pew Charitable Trusts Conference on Strategies for Revitalizing the Housing Market (May 30, 2012) (stating that "[a]nd pay relief is a huge driver of modification success…For 2011 modifications, those with <20% pay relief had a 12-month re-default rate of 30%; those with

To ease the compliance burden for the smallest servicers, we would support exempting small servicers from the requirement to offer loss mitigation as defined by the CFPB in § 1026.41(e)(4) of the Truth in Lending Act (Regulation Z) Mortgage Servicing Proposal. The CFPB defines this exception as covering servicers with less than 1,000 mortgages that they either own and still service or that they originated and retain the servicing rights for. This exception would be acceptable here, because these servicers would have a generally aligned interest in mitigating any losses from a borrower going to foreclosure. The CFPB's current proposal would still apply to these exempted servicers, however, and they would be required to offer loss mitigation for all loans if they offered loss mitigation for any subset of loans. In addition, the CFPB should exclude servicers with a substantial number of HOEPA loans from qualifying for this exception.[15]

It is worth emphasizing that a servicer requirement to have a loss mitigation review process does not necessitate prescribing loss mitigation criteria, specified waterfalls or debt-to-income targets, or NPV models or assumptions. Servicers would retain their discretion on how to structure loan modification terms and the models used to assess whether a borrower qualifies for any loan modification offered by that servicer.

Related to the requirement that servicers engage in a loss mitigation review process, we also recommend allowing borrowers to enforce the loss mitigation review process through the error resolution system established in the CFPB's proposed rule. The CFPB's proposed rule includes an error resolution process where a borrower can seek to have errors corrected by the servicer. The current proposal allows borrowers to raise errors if a servicer has an obligation to delay a foreclosure sale but instead moves forward with such a sale, and the final rule should also allow borrowers to raise errors related to the loss mitigation review process itself. This will provide servicers with an incentive to follow process requirements and will enable borrowers to ensure that the loss mitigation process works as intended.

#3: Require early loss mitigation outreach for delinquent borrowers.

The CFPB is right to require early intervention with delinquent borrowers in its proposed rule. Outreach to borrowers early in delinquency is both good for borrowers and a good business practice. Research shows that borrowers have a lower re-default rate the earlier they are reached in delinquency.[16]

>60% pay relief had a re-default rate of 12%.") (available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Goodman_et_al_%20Modification_Effectiveness.pdf).

[15] In CRL's experience gained through litigating a number of HOEPA cases, HOEPA lenders – who often engage in the worst abusive origination and servicing practices – typically originate and service their own loans. As a result, these servicers would likely meet the CFPB's standard for small servicers without a clarification that such servicers do not qualify for this exception.

[16] *See generally* Goodman, Yang, Ashworth, and Landy, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, Submitted to the Pew Charitable Trusts Conference on Strategies for

As noted by the CFPB in its proposal, early outreach is already a required industry norm. The GSEs require that servicers attempt phone contact with high risk delinquent borrowers by day 3 of delinquency and non-high risk borrowers by day 16.[17] They also require servicers to send two early written notices between days 31-35 and 61-65 of delinquency.[18] Similarly, the AG settlement requires that servicers follow HAMP outreach guidelines,[19] which include multiple phone calls and two written notices within 30 days from first delinquency.[20]

The CFPB's proposal requiring verbal outreach to delinquent borrowers within 30 days of delinquency is an appropriate consumer protection benchmark and is in line with existing early notice requirements. Additionally, the Bureau's definition of "make good faith efforts to notify" as requiring three phone call attempts on three separate days is a logical provision. Since requiring phone call attempts to begin on day 28 of delinquency is well behind the current GSE requirements, the CFPB proposal should not be a compliance burden for servicers.

On the CFPB's written notice requirements, we support the general approach of requiring a delinquency notice within 40 days of delinquency. There is no perfect cut-off point, and the 40-day window to send a written notice is compatible with the GSE requirement to send an initial notice in between 31 and 35 days of delinquency. In establishing this 40-day notice deadline, we recommend including an exception where servicers use behavior modeling to identify chronically late payers that do not appear at risk of serious delinquency and where this early written notice is unlikely to be helpful. This exception is in line with current GSE standards and practice.[21] For those borrowers where the servicer takes advantage of this exception, the servicer should still be required to send a mandatory notice, not subject to exception, within 70 days of delinquency. Furthermore, the CFPB should adopt this behavior modeling exception in lieu of, not in addition to, the provision requiring a written delinquency notice only once every 180 days.

In finalizing this rulemaking, the CFPB should add to its current proposal and require servicers to inform delinquent borrowers about available loss mitigation options in both verbal and written communications with the borrower, including providing an application form and a clear list of all required supporting documentation necessary to be considered a complete application. CFPB should follow the GSE standards, which currently require providing borrowers with a loss mitigation application when sending early delinquency notices.[22] In verbal conversations with the borrower and in written

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Revitalizing the Housing Market, p. 7 (May 30, 2012) (available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Goodman_et_al_%20Modification_Effectiveness.pdf).

[17] Fannie Mae, *Outbound Call Attempts Guideline*, (October 1, 2011) (available at https://www.efanniemae.com/sf/guides/ssg/relatedservicinginfo/exhibits/pdf/outboundcallattguide100111.pdf).

[18] Fannie Mae Servicing Guide, at 702-5 – 702-6 (March 14, 2012).

[19] AG Settlement Consent Judgment, at Exhibit A § IV(D) (April 4, 2012) (citing MHA Handbook version 3.2, Chapter II, Section 2.2).

[20] Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Version 3.2, p. 51 (June 1, 2011) (available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_32.pdf).

[21] Fannie Mae Servicing Guide, at 702-5 – 702-6 (March 14, 2012).

[22] *Id*., at 702-7 – 702-9.

notices, the servicer should also inform the borrower of loss mitigation options, the loss mitigation application process, and the pre-foreclosure referral deadline.

#4: Include requirements for servicers to timely process complete applications, to work with borrowers who submit incomplete applications, to disclosure specific reasons for a denied application, and to offer an appeals process.

The Bureau's proposal includes appropriate provisions on processing and timely reviewing a complete application. We support the provision that servicers would have a maximum of 30 days to review a complete loss mitigation application. Additionally, the specific proposal that servicers have a duty to use "reasonable diligence" in helping borrowers complete an incomplete loss mitigation application is also appropriate.

The CFPB also makes appropriate proposals in the event that a servicer denies a borrower's loss mitigation application. Specifically, we support the proposal that servicers must disclose a specific reason for the denial and permit the borrower to appeal a denied loan modification. We also support the proposal that the servicer must disclose objective inputs used in the event that the servicer denies a loan modification because it does not pass the servicer's net present value (NPV) model. Lastly, in situations where loss mitigation is denied based on investor requirements, we also support the Bureau's proposal that the servicer must identify the owner or assignee and specify the specific reason for the investor denial instead of only stating that the investor denied the application.

In addition to these proposals, the CFPB should also require the following concerning loss mitigation applications. First, similar to the California Homeowners Bill of Rights,[23] a borrower who is denied a loan modification based on a negative NPV analysis should have the ability to submit a written request to obtain additional inputs used in the NPV analysis.[24] This is not a new concept for servicers outside of California, since HAMP requires servicers to provide the borrower with all inputs to the HAMP NPV model when a servicer has undertaken an NPV analysis.[25] This right to information would not create a borrower right to challenge any of the subjective assumptions that underlie an NPV analysis, such as projected prepayment rates, re-default rates, and house price appreciation paths. It would, however,

[23] California Homeowner Bill of Rights, § 7 (2012).

[24] Suggested additional inputs to make available to borrowers upon request for NPV inputs include: Gross monthly income; Monthly property taxes; Monthly hazard insurance; Monthly homeowner's/condo association fee (if any); Current property value; Type of Investor; Date of NPV run; Unpaid balance before modification; Unpaid balance including capitalized arrears and advances; Months past due; Interest rate of proposed modification; Amortization term of proposed modification; Amount of any principal forbearance or principal reduction in the proposed modification; Breakdown of arrearage, including interest, insurance, taxes, fees/costs, other.

[25] *See* Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Version 4.0, p.71 (August 17, 2012) (available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf); *see also* HAMP Non-Approval Notice Example (available at https://checkmynpv.com/sites/all/themes/npvtool/pdf/CheckMyNPV-HAMP-Non-Approval-Notice-Example.pdf).

help make sure that the servicer and borrower are both acting on the basis of the same objective facts regarding the loan, which can only help in reaching the correct outcome.

Second, where a servicer denies a borrower based on investor requirements, the servicer should be required to disclose the portion of the Pooling and Servicing Agreement applicable to the denial. In the alternative, the servicer should provide a link to the appropriate filing under EDGAR. Disclosing this information will help ensure that borrowers are provided with an accurate reason for a denial and will result in a more transparent and accountable process.

Third, the CFPB should provide additional guidance on how the 14-day borrower response and appeal window is measured since this is a short timeframe and could be undercut if it were interpreted to include the days in between mailing a written notice and when the borrower actually receives written notice of a servicer decision.

Lastly, the CFPB should allow borrowers to submit subsequent loss mitigation applications if there is a material change in their circumstances as compared to the prior application, such as the addition or loss of a source of income in the household. If there is not a material change in circumstances, a servicer would not be required to consider a subsequent application from a borrower, and if the servicer does consider this subsequent package, it would not be required to follow the process requirements recommended here.

#5: Prohibit referring loans to foreclosure while considering a loss mitigation application submitted in the pre-referral time period.

The clear best practice in the mortgage servicing industry is setting process benchmarks *before* a borrower is referred to foreclosure in both judicial and nonjudicial jurisdictions. The GSE servicing alignment initiative, the AG settlement, and the California Homeowner Bill of Rights all draw a line in the sand and require servicers to uphold borrower protections before referring a borrower to foreclosure.[26] This is an industry standard that benefits borrowers and mitigates servicer costs. From a borrower's perspective, bad things happen once a loan is referred to foreclosure – they begin to accumulate significant legal fees, their credit is further damaged, and their names are public for scammers seeking to benefit from a bad situation. From investors' and servicers' perspectives, legal fees begin to rise and

[26] *See* Fannie Mae Servicing Guide, at 801-3 – 801-4 (March 14, 2012) (stating that "[s]ervicers should be able to refer a mortgage loan to foreclosure no later than the 120th day of delinquency except in circumstances where borrowers submit Borrower Response Packages shortly before the foreclosure referral").; AG Settlement Consent Judgment, at Exhibit A, § IV(B)(1) (April 4, 2012) (stating that "[i]f a borrower has not already been referred to foreclosure, Servicer shall not refer an eligible borrower's account to foreclosure while the borrower's complete application for any loan modification program is pending if Servicer received (a) a complete loan modification application no later than day 120 of delinquency, or (b) a substantially complete loan modification application…no later than day 120 of delinquency and Servicer receives any required hardship documentation no later than day 130 of delinquency"); California Homeowner Bill of Rights, § 7.

it becomes harder to reduce losses. Simply put, holding off on referring a loan to foreclosure when there is still a chance that the servicer will permit loss mitigation is a win-win.

To make the CFPB's rulemaking consistent with GSE standards and the AG settlement, the Bureau should include a period of pre-foreclosure protections in the final rulemaking. First, servicers should give borrowers through the 120th day of delinquency to submit a complete loss mitigation application before referring a borrower to foreclosure.[27] Second, if a borrower submits a complete loss mitigation application before foreclosure referral, the servicer should not refer the borrower to foreclosure while evaluating the application. In addition, the CFPB should go one step further than the GSE standards and the AG settlement, but consistent with the California Homeowners Bill of Rights,[28] and require that servicers also complete the appeals process before being able to refer a borrower to foreclosure. This step will provide servicers a further incentive to complete their consideration and appeals in a timely basis since servicers control how quickly they complete an evaluation.

Failing to require a defined pre-foreclosure period with protections in this rulemaking would be a mistake, and would make the CFPB's proposed rule inconsistent with existing servicing requirements. Pre-foreclosure protections provide clear expectations, definitive timelines, and encourage all parties to begin and complete loss mitigation as soon as possible instead of waiting until the borrower is more delinquent, accrues greater unpaid balances and fees, and grows less likely to succeed with a modification. As comprehensive as the other sections of this proposed rulemaking may be, no additional requirement proposed by the CFPB compensates for excluding pre-foreclosure protections.

#6: Post-foreclosure referral, prohibit servicers from advancing the foreclosure process while evaluating a complete application.

Once a borrower is referred to foreclosure, we recommend prohibiting servicers from advancing the foreclosure process when a borrower has submitted a complete loss mitigation application by the specified deadline. This would require servicers to maintain the status quo while evaluating the application and during any appeals process. This policy would reduce confusion about when the servicer is advancing the foreclosure and when the parties are attempting to reach a loss mitigation agreement.

This recommendation is not a requirement for the servicer to dismiss and then restart the foreclosure process. Instead, the servicer would have an obligation to take actions or refrain from affirmative actions that prevent the foreclosure process, in both judicial and non-judicial jurisdictions, from advancing to the next stage. This requirement would apply to the entire foreclosure process, not just to preventing a foreclosure sale from taking place. For example, this recommendation would prohibit

[27] Similar to the GSE standards, an exception to this 120 day period may be appropriate in situations where properties are abandoned. *See* Fannie Mae, *Servicing Guide Announcement SVC-2011-08R, Delinquency Management and Default Prevention (Reissued), Frequently Asked Questions*, p. 9 (updated April 25, 2012) (available at https://www.efanniemae.com/sf/servicing/pdf/alignedrequirementsfaqs.pdf).
[28] California Homeowner Bill of Rights, § 7.

servicers from seeking a judgment of foreclosure while a complete application is being evaluated. It would not, however, prevent servicers from taking actions that maintain the status quo of the judicial or non-judicial proceeding as of the date the application is submitted, such as by providing status reports in a court foreclosure or mediation process or by providing notice in a non-judicial foreclosure proceeding that is necessary to avoid reinstituting the sale process. Furthermore, servicers should also be found in compliance with this requirement if they make a good faith effort to not advance the foreclosure process but are unable to do so as a result of a court decision or other official action.

It is important for the CFPB to include this borrower protection, because preventing the foreclosure process from moving forward while a servicer evaluates a complete application submitted after referral (but before the deadline) is only required in limited circumstances by the GSE and AG settlement standards.[29] Promulgating this protection will go a long way to streamlining the loss mitigation review process by giving servicers an incentive to quickly complete this evaluation and any appeal and then continue with the foreclosure process through sale if the borrower is not eligible for loss mitigation. It would also save servicers from spending on foreclosure costs while pursuing loss mitigation with the borrower.

It should be noted that servicers have additional experience with the mechanics of deferring advancement of the foreclosure process once a borrower is referred to foreclosure. For example, under HAMP, servicers are prohibited from advancing the foreclosure process during the trial modification period.[30] Additionally, for borrowers that submit a complete application within 30 days of the Post Referral to Foreclosure Solicitation Letter, the AG settlement also prohibits servicers from taking some advances while the borrower is in a trial modification.[31] As these examples show, servicers should be able to comply with the above recommendation. In addition, some servicers already make it voluntary practice to not advance the foreclosure process while considering a complete application.

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[29] Fannie Mae Servicing Guide, at 801-38 – 801-39 (March 14, 2012) (stating "[i]f a Borrower Response Package is received within 30 days of the mailing of the Post Referral to Foreclosure Solicitation Letter: Judicial Jurisdictions – The servicer must delay filing a Motion for Judgment…or, if a Motion is already filed, take reasonable steps to avoid a ruling on the Motion for up to 30 days to conduct an evaluation of the Borrower Response Package. Other legal actions must not be delayed at this time. Nonjudicial Jurisdictions – No delay in legal action is required to conduct an evaluation of the Borrower Response Package"); AG Settlement Consent Order, at Exhibit A, § IV(B)(4) (April 4, 2012) (stating "[i]f after an eligible borrower has been referred to foreclosure, the Servicer receives a complete application from the borrower within 30 days after the Post Referral to Foreclosure Solicitation Letter, then while such loan modification application is pending, Servicer shall not move for foreclosure judgment or sale (or, if a motion has already been filed, shall take reasonable steps to avoid a ruling on such motion), or seek a foreclosure sale."); *see also* California Homeowner Bill of Rights, § 15.

[30] *See* Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Version 4.0, p.75-76 (August 17, 2012) (available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf).

[31] *See* AG Settlement Consent Order, Exhibit A, § IV(B)(4).

#7: Complete application deadline should be 14 days – not 90 days – before a scheduled foreclosure sale.

The CFPB's proposal to allow servicers to set a deadline for completion of a loss mitigation package as early as 90 days before a scheduled or estimated foreclosure sale date is an unworkable scheme and should be changed before finalizing the rulemaking. This 90-day deadline may seem appealing on its face because it would allow servicers to have the fully allotted time under the proposed rule to process an application and a resulting appeal without delaying sale, but it would frustrate servicers and harm borrowers in practice.

Allowing servicers to set a loss mitigation application deadline in this manner would make it more difficult for borrowers to access loss mitigation options instead of easier. In some jurisdictions, a 90 day deadline might come relatively early in the allowable foreclosure process timeline, and this would require that borrows either submit an application very early in delinquency or not at all. In other jurisdictions with a comparatively longer foreclosure process timeline, servicers might have considerable difficulty estimating a foreclosure sale date. This might require servicers to change the application deadline multiple times as the foreclosure process moves forward. Additionally, allowing servicers to communicate deadlines based on *estimated* foreclosure sale dates could lead to the unintended consequence of confusing borrowers about the status of the foreclosure process, such as implying that the servicer has a judgment of foreclosure or has already won the case.

Another concern with this deadline is that it conflicts with widespread industry practices that provide greater borrower protections. GSE standards and the AG settlement provide that servicers undertake an "expedited review" if a complete application is submitted between 15-37 days before a scheduled foreclosure sale.[32] Instead of adopting industry best practices, this proposal threatens to set a dangerously low bar that is also more difficult to administer.

Instead of allowing for this 90-day deadline, the final loss mitigation rule should adopt an application deadline set 14 calendar days before a scheduled foreclosure sale. Servicers should be required to evaluate applications received on or before this cutoff point, whether they expedite review or not, and delay a foreclosure sale if additional time is needed to evaluate the application and give the borrower the 14-day response period. If the servicer denies the application, servicers should also be required to delay the foreclosure sale, if necessary, to complete the appeal review. For borrowers who submit a complete application after this 14 day cut off point, servicers would not be required to evaluate the application but would be encouraged to do so voluntarily. However, servicers would have the obligation to inform the borrower before the foreclosure sale date of either the outcome of an application evaluation or that the servicer was unable to review the application prior to sale. If the servicer approves a loan modification in this period of time, it must give the borrower 14 days to accept and, if necessary, delay the foreclosure sale during this 14-day window.

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[32] *See* Fannie Mae Servicing Guide, at p.801-40 (March 14, 2012); AG Settlement Consent Order, Exhibit A, § IV(B)(8).

This review process is largely in line with requirements in the GSE standards and the AG settlement; however, for applications submitted before the recommended deadline, our proposal would additionally require that servicers place foreclosure sales on hold, if necessary, during an appeal process. While the CFPB aimed to avoid the possibility that the sale date would ever be delayed in its proposal, we believe that this recommendation is not only better for the borrower but also less burdensome for servicers than the current application deadline proposal. A short delay at the end of the process when a borrower has submitted a complete package that represents its last chance to save its house is a price worth paying, a point that many servicers agree with through their voluntary best practices.

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