

**Center for Responsible Lending
and
National Community Stabilization Trust**

Comment to the Consumer Financial Protection Bureau

Notice of Proposed Rulemaking

**Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate
Settlement Procedures Act (RESPA), Regulation X**

12 CFR Part 1024

Docket No. CFPB-2021-0006

RIN 3170-AB07

Submitted via [regulations.gov](https://www.regulations.gov)

I. Introduction

The Center for Responsible Lending (CRL)¹ and the National Community Stabilization Trust (NCST)² appreciate the opportunity to comment on the Consumer Financial Protection Bureau's proposed rule on Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X.

Our organizations strongly support the Bureau's goals of preventing avoidable foreclosures and maximizing home retention. However, we believe the proposed rule as drafted will not achieve the stated goals. The Bureau proposes a pre-foreclosure review period through the end of 2021 for primary residences to give mortgage servicers an opportunity to engage in loss mitigation. However, other than postponing the date of foreclosure initiation, that period in and of itself does nothing to alter servicer behavior.

Specifically, without a strong incentive for servicers to engage in loss mitigation, the pre-foreclosure review period simply becomes a temporary moratorium and has the effect of setting up an artificial cliff that encourages a large number of foreclosure filings in a short period of time as soon as the review period ends, which will have negative consequences both for the foreclosure system and for communities.

At the same time, a rule that pauses foreclosures until December 31 would do nothing for those whose forbearance runs through or beyond that cutoff and who also face a risk of an avoidable home loss. We believe a 120-day grace period for loans coming out of forbearance plus enabling servicers to offer streamlined payment reduction modifications would be a more effective and beneficial resolution for the vast majority of loans that are delinquent.

However, if the Bureau declines to provide for a 120-day grace period and instead elects to move forward with the pre-foreclosure review period, it should include carefully crafted off-ramps that drive effective loss mitigation and incentivize servicers to offer streamlined payment reduction modifications to borrowers. These off-ramps should be stronger than the ones described in the proposed rule, and we describe our recommendations in detail in Section IV. That way the pre-foreclosure review period can live up to its name for those borrowers not in forbearance or whose forbearance ends after the rule takes effect and before the expiration of the review period. Moreover, before servicers file for foreclosure, they should also satisfy early intervention requirements and, where the borrower commences the loss mitigation process, reasonable diligence requirements as well.

¹ CRL is a nonprofit, 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. For 40 years, Self-Help has created asset-building opportunities for low-income individuals, rural communities, women, and families of color. In total, Self-Help has provided over \$9 billion in financing to 172,000 homebuyers, small businesses, and nonprofit organizations and serves more than 160,000 mostly low-income families through 72 credit union branches in North Carolina, California, Florida, Illinois, South Carolina, Virginia, Washington, and Wisconsin

² NCST is a national, nonprofit organization that works to support healthy housing markets and communities. Since its founding in 2008, NCST has facilitated the return to productive use of more than 27,00 properties purchased and rehabbed by nonprofit and mission-aligned developers. NCST also seeks to develop sources of affordable capital for community-based developers and advocates for policies to prevent neighborhood blight, promote stable communities, support affordable homeownership, and advance racial equity in housing.

II. Background

Due to underlying health and economic disparities that are the result of systemic inequities, low-income communities and communities of color have been hard hit by the COVID-19 crisis, including in the housing arena.³ As the Bureau discusses in its recent research brief, borrowers in forbearance or delinquent are disproportionately Black and Hispanic.⁴ For example, 33% of borrowers in forbearance (and 27% of delinquent borrowers) are Black or Hispanic, while only 18% of the total population of mortgage borrowers are Black or Hispanic.⁵ The Bureau also finds that forbearance and delinquency are significantly more common in communities of color and lower-income communities.⁶

The Great Recession exacerbated the longstanding gap between the homeownership rates of Blacks and Hispanics relative to whites – a gap that is a large driver of the enormous wealth gap that exists. History must not be allowed to repeat itself. As the uneven recovery to the pandemic continues, and to avoid further perpetuating racial homeownership gaps and wealth gaps, it is therefore essential that the Bureau create a framework that incentivizes servicers to provide meaningful loss mitigation to borrowers.

III. The Bureau Should Adopt a 120-Day Buffer for Borrowers Exiting Forbearance to Aid the Greatest Number of Borrowers and Prevent Avoidable Foreclosures

To help the greatest number of borrowers in forbearance obtain a sustainable post-forbearance option, the Bureau should impose a 120-day grace period for loans exiting forbearance. Consistent with Regulation X, servicers should not be permitted to make the first notice or filing for any judicial or nonjudicial foreclosure until the mortgage is more than 120 days delinquent, or, in this case, more than 120 days past the expiration of a forbearance.⁷ Although servicers should be working with borrowers long before forbearance ends to facilitate an affordable, post-forbearance plan, it is nonetheless essential that borrowers exiting forbearance have the time needed to work with their servicer to be able to access a loss mitigation solution and servicers should not be permitted to initiate foreclosure until the expiration of this buffer period.

A 120-day grace period would be preferable to a one-size-fits-all pre-foreclosure review period for several reasons. Because the Bureau's proposal would only put a pause on foreclosure between approximately September 1 (or whenever the rule takes effect) and December 31, it leaves out several groups of vulnerable borrowers. First, the proposal does not assist borrowers in forbearance who exit forbearance on January 1, 2022, or afterward. In fact, the proposal could be detrimental to these borrowers, as servicer capacity to engage in effective loss mitigation will be strained with a large number of foreclosures filed at the beginning of 2022.

³ See Urban Institute, *Tracking COVID-19's Effects by Race and Ethnicity*, <https://www.urban.org/tracking-covid-19s-effects-race-and-ethnicity>; Xudong (Sean) An, Larry Cordell, Liang Geng, and Keyoung Lee, *Inequality in the Time of COVID-19: Evidence of Delinquency and Forbearance*, Federal Reserve Bank of Philadelphia (February 2021), <https://www.philadelphiafed.org/consumer-finance/mortgage-markets/inequality-in-the-time-of-covid-19-evidence-from-mortgage-delinquency-and-forbearance>.

⁴ Consumer Financial Protection Bureau, Special Issue Brief: *Characteristics of Mortgage Borrowers During the COVID-19 Pandemic* (May 2021), https://files.consumerfinance.gov/f/documents/cfpb_characteristics-mortgage-borrowers-during-covid-19-pandemic_report_2021-05.pdf.

⁵ *Id.*

⁶ *Id.*

⁷ 12 CFR § 1024.41(f)(1)(i).

Second, because the proposal contains a significant gap between now and the date when the pre-foreclosure review period would likely begin, it sets up a perverse incentive in which servicers that are legally permitted to initiate foreclosure may rush to foreclosure on those whose forbearance has already ended or who are delinquent and never obtained forbearance. While there are a large number of borrowers with federally-backed loans who exited forbearance and are now delinquent, private loans borrowers would likely be at an even higher risk of a hastened foreclosure. According to Black Knight, in data included as part of its February 2021 report, 89,000 private loans were over 90 days delinquent and had not entered a forbearance program.⁸ Further, of all loans in this category, 84% were delinquent before COVID-19 hit last March,⁹ many of which were extremely delinquent at that time.

IV. The Bureau Should Include Effective Off-Ramps That Incentivize Meaningful Loss Mitigation, Particularly Streamlined Modifications

If the Bureau moves forward with the pre-foreclosure review period, it should include carefully crafted off-ramps that incentivize servicers to place borrowers into an affordable solution. Without effective off-ramps, it is highly unlikely that a borrower that has been delinquent for potentially several years will move to a permanent solution during this particular four-month period, and much more likely that their situation will simply be exacerbated come January 1, 2022. The Bureau should also include an off-ramp for vacant and abandoned properties.

The off-ramps described in the preamble on their own are insufficient. While many borrowers will be able to resume their mortgage payment and afford streamlined deferrals or partial claims, many borrowers are suffering longer-term income disruptions, particularly those who will have taken the maximum amount of forbearance available to them. These borrowers will need a payment reduction modification, which has been empirically shown to be the most sustainable way to keep borrowers in their homes.¹⁰ A streamlined process – one that does not require a complete application – maximizes the likelihood of success.¹¹ Thus, we urge off-ramps that incentivize servicers to offer and enable borrowers to easily accept a payment reduction modification, whether or not the servicer makes phone contact with the borrowers. With that goal in mind, we recommend the off-ramps be defined as follows.

Off-ramp #1:

The servicer is permitted to foreclose if:

- (1) It is unable to establish right party contact with the borrower even though it exercised reasonable diligence in attempting to do so; and

⁸ Email communication between Self-Help and Black Knight.

⁹ Black Knight, Mortgage Monitor, at 12 (March 2021), https://cdn.blackknightinc.com/wp-content/uploads/2021/04/BKI_MM_Mar2021_Report.pdf (Black Knight reports that of all seriously delinquent loans, including loans in foreclosure, that are not in active loss mitigation and have not entered a COVID forbearance program, 33,000 became delinquent post-COVID and 178,000 loans were delinquent pre-COVID).

¹⁰ Peter Ganong and Pascal Noel, *Liquidity Versus Wealth in Household Debt Obligations: Evidence from Housing Policy in the Great Recession*, *American Economic Review*, 110(10): 3100-3138 (2020).

¹¹ Laurie Goodman, Walt Scott, and Jun Zhu, *How Beneficial are Streamlined Modifications: The Fannie Mae Experience*, Urban Institute (July 2018), https://www.urban.org/sites/default/files/publication/98784/how_beneficial_are_streamlined_modifications_3.pdf.

(2) After exercising reasonable diligence in trying to reach the borrower, the servicer sends a streamlined payment modification offer or solicitation with at least an initial estimate of the payment reduction and a notification and the borrower does not accept it. Additionally, the servicer should be required to notify the borrower of the availability of other loss mitigation options and how to apply for them.

Reasonable diligence could be defined similarly to the Home Affordable Mortgage Program (HAMP). As the Bureau describes in the preamble, reasonable diligence could include multi-modal communication attempts, such as: (1) making a minimum of four telephone calls to the last known phone numbers of record, at different times of the day; and (2) sending two written notices to the last address of record by sending one letter via certified/express mail or via overnight delivery service with return receipt/delivery confirmation and one letter via regular mail.¹² The HAMP rules stated that the attempts had to occur over a period of at least 30 days,¹³ which is reasonable.

We also believe that the Bureau should consider efforts to count if they occurred after June 1. By then, vaccines will have been widely available for some time and hopefully the economy will be more opened up than it was earlier in the year, so that going forward borrowers' circumstances will at least be stable if not improving. There is no reason to insist that these efforts should only be considered if they occur after the effective date of the rule; better that overloaded servicers are able to spread their work over a six-month period to permit them to spend time on other borrowers, including those exiting forbearance.

With respect to eligible streamlined modifications, the modification should meet the requirements the Bureau describes in the proposal, including:

- (1) the loan modification must be made available to a borrower experiencing a COVID-19 related hardship;
- (2) the loan modification may not cause the borrower's monthly required principal and interest payment to increase and may not extend the term of the loan by more than 480 months from the date the loan modification is effective;
- (3) any amounts that the borrower may delay paying until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures, must not accrue interest;
- (4) the servicer may not charge any fee in connection with the loan modification and must waive all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the loan modification; and
- (5) the borrower's acceptance of an offer of the loan modification must end any preexisting delinquency on the mortgage loan or the loan modification must be designed to end any preexisting delinquency on the mortgage loan upon the borrower satisfying the servicer's requirements for completing a trial loan modification plan and accepting a permanent loan modification.¹⁴

¹² 86 Fed. Reg. 18840, 18865 (April 9, 2021).

¹³ Making Home Affordable Program, *Handbook for Servicers of Non-GSE Mortgages*, Version 5.3, at 94 (February 5, 2019), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_53.pdf#page=94.

¹⁴ 86 Fed. Reg. 18840, 18878-79.

Off-ramp #2:

The servicer can foreclose if, after June 1 for the same reasons as off-ramp #1, it establishes right party contact and:

(1) The borrower submits a complete application, the servicer follows the Regulation X procedures (including notification requirements) and determines that the borrower is not eligible for a home retention option (including a streamlined payment reduction modification), or the borrower declines all retention options for which they are eligible; or

(2) The borrower does not submit a complete application, the servicer sends a streamlined payment reduction offer or solicitation with at least an estimate of monthly payment and a notification of the borrower's right to submit a complete application, and the borrower does not accept it. Additionally, the servicer should be required to notify the borrower of the availability of other loss mitigation options and how to apply for them.

These same off-ramps could be used if the Bureau adopts the 120-day grace period approach rather than the pre-foreclosure review period.

Off-ramp #3:

Finally, there should be an off-ramp for vacant and abandoned properties, which will encourage servicers to foreclose on them and help avoid blight. Vacant or abandoned homes that do not go through foreclosure risk blighting the community.¹⁵ The longer a property sits empty, the greater the chance it will deteriorate and attract crime, and the more harm it will cause its neighbors, its investors, the local tax base, and neighborhood property values.

While the proposal states in the preamble that abandoned properties are not subject to the review period because they are by definition not a principal residence, it is critical to provide clarity around this issue for servicers, specifying both that they can move forward on foreclosure for vacant and abandoned properties and providing them with a definition to rely on. We recommend the Bureau make clear that servicers can use the definitions as embodied in state law or, in a state without a definition, by the Uniform Law Commission's proposed definition in the Uniform Home Foreclosure Procedures Act.

The need for these off-ramps is clear. If the pause on foreclosures for all borrowers ends on the same date, the foreclosure system may be overwhelmed with foreclosure filings as of early January 2022. As we saw in the 2008 foreclosure crisis, an overloaded system was a significant contributor to neighborhood blight and a slower economic recovery. In some jurisdictions, delays in processing foreclosures will be made worse by COVID-related court backlogs. There are also reports within the mortgage industry about a shortage of attorneys that specialize in processing foreclosures, which if true will further slow the foreclosure system.

The off-ramps should therefore provide the opportunity to spread out any unavoidable foreclosures over time in a reasonable manner, as our three suggestions would.

¹⁵ See, e.g., Tim Reid, *U.S. Cities Struggle With Blighted Bank-Owned Homes*, Reuters, June 8, 2012, <https://www.reuters.com/article/us-usa-housing-blight/u-s-cities-struggle-with-blighted-bank-owned-homes-idUSBRE85707320120608>.

V. The Bureau Should Use its Existing Tools to Promote Data Transparency

The Bureau should leverage its existing tools to provide transparency on how borrowers are faring in loss mitigation efforts. For example, the Bureau should utilize the National Mortgage Database, supervisory material, and survey data to inform its research. The data should be disaggregated by loan channel, census tract, race, ethnicity, and other demographic criteria. It is critical to have a holistic understanding of which borrowers are receiving deferrals, partial claims, and loan modifications, as well as which borrowers are facing foreclosure. Such data will also help inform other government programs, such as the Homeowner Assistance Fund.

Thank you for considering our comments on these critical issues.