



WASHINGTON, D.C.

99 M Street SE
Suite 300
Washington, D.C. 20003-3799

Phone: 202-638-5777

Fax: 202-638-7734

August 14, 2020

Office of Regulations
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA)(Regulation X); Docket No. CFPB-2020-0022.

Dear Sir or Madam:

The Credit Union National Association (CUNA) proudly represents America's credit unions and their 115 million members. On behalf of our members, we are writing regarding the Consumer Financial Protection Bureau's (CFPB or Bureau) interim final rule to amend Regulation X to temporarily permit mortgage servicers to offer certain loss mitigation options based on evaluation of an incomplete loss mitigation application submitted by borrowers experiencing financial hardships due, directly or indirectly, to the COVID-19 emergency.¹

Background

The servicing requirements contained in Regulation X (Rule) obligate mortgage servicers, among other things, to obtain a complete loss-mitigation application before evaluating a borrower for a loss-mitigation option, such as a loan modification.² The Rule provides limited exceptions from this requirement for certain short-term loss mitigation options, including temporary payment forbearance programs.³ However, the flexibility afforded by these exceptions does not align with certain COVID-19 emergency mortgage forbearance programs, in part because they still require additional due diligence to obtain a complete loss mitigation application.

¹ Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA)(Regulation X), 85 Fed. Reg. 39055 (June 30, 2020).

² See 12 CFR § 1024.41(b)(1) (requiring servicers to exercise reasonable diligence in obtaining documentation and information necessary to complete a borrower's loss mitigation application); 12 CFR §1024.41(c)(2)(i)(prohibiting servicers from offering loss mitigation based on an incomplete loss mitigation application).

³See 12 CFR § 1024.41(c)(2)(iii) (allowing servicers to offer short-term payment forbearance or repayment plans to borrowers based upon an evaluation of an incomplete loss mitigation application); See also, CFPB Official Interpretation of 41(c)(2)(iii)(stating that "[a] short-term payment forbearance program for purposes of [this sub-section] allows the forbearance of payments due over periods of no more than six months," and that "[s]uch a program would be short-term regardless of the amount of time a servicer allows the borrower to make up the missing payments.").

On March 27, 2020, The Coronavirus Aid, Relief, and Economic Security (CARES) Act was enacted and it, among other things, provided access to payment forbearance programs for borrowers who have “Federally-backed mortgage loans”⁴ and experience a financial hardship due, directly or indirectly, to the COVID-19 emergency. In order to provide flexibility to servicers handling these requests, the CARES Act did not specify how long the forbearance periods should last or how the forborne amounts should be repaid. On April 3, 2020, the CFPB and the National Credit Union Administration joined with other federal and state banking regulators to issue an interagency letter (Joint Statement) informing servicers of a flexible supervisory and enforcement approach regarding certain servicing and loss mitigation rules during this emergency.⁵ Regarding Regulation X, the joint statement specifically stated that a CARES Act-eligible forbearance requested during the COVID-19 emergency constitutes an incomplete loss mitigation application under the Rule and triggers a servicer’s obligations to, and can take advantage of the limited exceptions in Regulation X under certain circumstances.

On May 13, 2020, the Federal Housing Finance Agency (FHFA) announced that the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Company (Freddie Mac, and together with Fannie Mae, the GSEs) would make a payment deferral program available to borrowers eligible for CARES Act forbearance plans.⁶ The FHFA’s program specifically allows for forborne amounts to be treated as deferred payments due upon sale or refinancing of the home or at the end of the loan term. In response to the FHFA announcement, the GSEs created a streamlined application process that offers payment deferrals to borrowers who can (i) afford to return to their normal monthly payments after the deferral but (ii) cannot afford to repay the forborne amount in a lump sum or in a repayment plan that increased their monthly obligation after exiting forbearance.

As the Bureau mentioned in its notice, as of June “as many as 4.3 million mortgage borrowers (or 8.55% of borrowers) nationwide were in forbearance programs.”⁷ These programs have been important tools allowing credit unions to help members negatively impacted by the COVID-19 crisis. However, credit unions and other industry stakeholders have rightly expressed concerns about their ability to follow the streamlined application procedures adopted for COVID-19 emergency loss mitigation programs while remaining in compliance with the servicing requirements in Regulation X.

For the above reason, the Bureau has proposed this interim final rule to amend Regulation X to specify that servicers may offer loss mitigation options that meet certain criteria based on the evaluation of an incomplete application, without needing to comply with certain other Regulation X requirements once the borrower accepts that option. Specifically, the new §1024.41(c)(2)(v)(A) permits servicers to offer a loss

⁴ See Coronavirus Aid, Relief, and Economic Security Act, § 4022(a)(2), 116th Cong., 2d Sess. (2020) (defining, generally, a “Federally backed mortgage loan” as any loan secured by a first or subordinate lien on residential real property designed principally for occupancy of from one-to-four families that is “insured by the Federal Housing Administration . . . guaranteed or insured by the Department of Veterans Affairs . . . or the Department of Agriculture . . . or purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.”)

⁵ See Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act, available at <https://www.ncua.gov/files/press-releases-news/interagency-statement-mortgage-servicing-policy-statement.pdf> (April 3, 2020).

⁶ See FHFA Announces Payment Deferral as New Repayment Option for Homeowners in COVID-19 Forbearance Plans, available at <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Payment-Deferral-as-New-Repayment-Option-for-Homeowners-in-COVID-19-Forbearance-Plans.aspx#:~:text=In%20response%20to%20the%20COVID,borrower%20after%20the%20forbearance%20ends> (May 13, 2020).

⁷ Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA)(Regulation X), 85 Fed. Reg. 39055, 39058 (June 30, 2020).

mitigation option based upon an evaluation of an incomplete application, provided the loss mitigation option: (i) permits the borrower to delay paying covered amounts until the loan is refinanced, property is sold, term of the mortgage ends or FHA insurance terminates; (ii) does not accrue interest, result in a fee and waives other accrued late fees and penalties upon borrower acceptance; and (iii) results in the end of any preexisting delinquency upon borrower's acceptance. The new §1024.41(c)(2)(v)(B) relieves servicers from certain regulatory requirements for borrowers who receive deferment under §1024.41(c)(2)(v)(A). For example, a servicer providing loss mitigation options that meet the requirements of the new exception will not have to obtain documents and information to complete the loss mitigation application or provide certain written notices to the borrower regarding status of the application and any additional documents and information needed.

These changes were designed to align Regulation X with the FHFA COVID-19 payment deferral program, the Federal Housing Administration's (FHA's) COVID-19 partial claim program and similar programs offered by other mortgage owners and servicers. These changes were adopted as an interim final rule on June 30, 2020, to be effective by the July 1, 2020 implementation of the FHFA's program.

General Comments

As not-for-profit, financial cooperatives, credit unions have a specified mission "to meet the credit and savings needs of consumers, especially persons of modest means."⁸ Pursuant to that mission, credit unions work every day to better their communities and secure their members' financial future. Particularly in times of national crisis, it is critical that the regulatory structure to which credit unions are subject, as well as the regulations that they must follow, allow them to meet the financial services needs of America's credit union members facing economic hardship and distress.

In a March 16, 2020 letter sent shortly after President Trump declared a national emergency for COVID-19, CUNA President & CEO Jim Nussle called for CFPB "to provide temporary flexibility for the consumer disclosure and application processing requirements related to loss mitigation efforts, especially for COVID-19 related loan modifications, forbearance agreements, and repayment plans."⁹ We appreciate the CFPB's responsiveness to that request, as shown through participation in the Joint Statement and promulgation of this interim final rule. While we acknowledge that a number of smaller credit unions are exempt from the requirements at issue in this notice due to qualification as a "small servicer" or "qualified lender,"¹⁰ we are pleased that covered credit unions and their impacted borrowers have benefited from the relief afforded by this timely update to Regulation X.

While CUNA generally supports these amendments to Regulation X, we believe the Bureau should consider the following:

Regarding the Bureau's question about whether the amendments appropriately balance providing flexibility to servicers to offer relief quickly during the COVID-19 emergency with providing important protections for borrowers engaged in the loss mitigation application process, the Bureau should clarify that when a non-delinquent borrower requests a deferral under the new §

⁸ Credit Union Membership Access Act, Pub. L. No. 105-219, § 2(4), 112 Stat. 913, 914 (1998).

⁹ See Letter from Jim Nussle to The Honorable Donald J. Trump, President of the United States (March 16, 2020) available at

https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment_Calls_Letters_and_Testimonies/2020/Comment_Letters/031620_POTUS_COVID19.pdf.

¹⁰ See 12 CFR 1024.30(b)(1) and (b)(3).

1024.41(c)(2)(v)(A), servicers are not required to provide the borrower with a complete loss mitigation application until a separate subsequent request arises.

As the Bureau stated in its interim final rule notice, the new Regulation X provisions were designed to relieve servicers of certain regulatory obligations that “introduce undue burden for servicers and borrowers attempting to navigate the unusual challenges caused by the COVID-19 emergency.”¹¹ Nevertheless, the notice states that even though the borrower’s acceptance of a payment deferral option under the new §1024.41(c)(2)(v)(A) ends any preexisting delinquency on the borrower’s mortgage loan account, “servicers must comply with the requirements of §1024.41 for the *first later* application, *which may occur during the same conversation* in which the borrower accepts the offer under § 1024.41(c)(2)(v)(A).”

This confusing example, involving one conversation that results in both a payment forbearance with repayment deferral under this exception *and* full compliance with the requirements associated with a complete loss mitigation application, appears to take away the benefits of the regulatory burden relief. The example is rendered even more confounding by the terms of the FHFA program that gave rise to this interim rule. As noted in the proposal, Fannie and Freddie have permitted servicers to offer the FHFA program *without* collecting a “complete Borrower Response Package.”¹² Instead, the GSEs permit servicers to offer the payment deferrals to any borrower that has experienced a financial hardship resulting from COVID-19 that has affected their ability to make their full monthly payment, provided that the borrower indicates: (1) *the ability to afford to resume their normal monthly payments due before the forbearance ends*; and (2) the inability to afford full reinstatement or a repayment plan to bring their mortgage loan current when they exit forbearance.

There is no plausible scenario where a borrower who meets the criteria of the FHFA program by declaring an ability to resume normal monthly payments before the end of the forbearance period should simultaneously trigger a complete loss mitigation application that is specifically not required for the program that the borrower has chosen. If this forbearance option is chosen by a borrower in conversation with their servicer, then the servicer should get the protections of the new § 1024.41(c)(2)(v)(B) without simultaneously losing those protections as contemplated in the Bureau’s example. In short, the situation described by the Bureau does not balance the burden and benefits for the servicer and borrower, but instead traps them both in a revolving door of obligations that merely adds to the confusion that this amendment is designed to eliminate. In any FAQ’s or future guidance, the Bureau should clarify that a separate and *later* inquiry from a borrower is required for a complete loss mitigation application.

Regarding the Bureau’s question about whether to require written disclosures for this, or any similar exceptions that the Bureau may authorize in the future, the Bureau should not require such written disclosures given that relief from written disclosure requirements is one of the benefits conferred by these new provisions.

This interim final rule acknowledges, among other things, that the timing and due diligence required for notice obligations of §1024.41(b)(2) place an undue burden on borrowers and servicers trying to navigate the myriad of challenges caused by the COVID-19 emergency. Replacing the obligation to provide those notifications with a new and unique disclosure notice obligation could simply add to the confusion and burdens rather than alleviate them.

¹¹ See Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA)(Regulation X), 85 Fed. Reg. 39055, 39062 (June 30, 2020).

¹² See Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA)(Regulation X), 85 Fed. Reg. 39055, 39058 (June 30, 2020).

Regarding the Bureau’s question about whether it should extend the exception established in the new § 1024.41(c)(3)(v) to other post-forbearance loss mitigation options made available to borrowers affected by other types of disasters and emergencies, the Bureau should consider adopting more generalized and flexible regulations for any temporary loss mitigation programs established to assist distressed borrowers during federally declared disasters or emergencies.

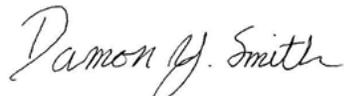
Credit unions are critical financial lifelines for their members, particularly in times of disasters and emergencies. As a result, covered credit unions and their members would benefit from the regulatory burden relief provided by this interim rule in other circumstances beyond the COVID-19 emergency or operation of the FHFA forbearance with payment deferral program. In light of the lessons learned in this difficult time, the Bureau should extend the temporary exceptions described by this notice to any streamlined loss mitigation programs designed to alleviate burdens for borrowers facing economic hardship due to disasters and emergencies. Because the Bureau cannot know the full contours of such programs or the nature of the specific disaster or emergency, the Bureau should consider creating a more generalized and flexible loss mitigation framework that is triggered for borrowers in geographies that are covered by federal emergency and disaster declarations. For example, FHA provides for significant changes to a servicer’s loss mitigation obligations in the event of a disaster, in recognition that servicers and borrowers benefit from additional flexibility while navigating such difficulties.¹³ Such a framework would ensure that regulations designed to protect borrowers do not end up burdening them or preventing them from getting desperately needed help on a timely basis when they need it the most.

Conclusion

We look forward to working with the Bureau to ensure credit unions can continue to provide critical and timely relief to distressed borrowers during this COVID-19 emergency and during future disasters and emergencies. On behalf of America’s credit unions and their 115 million members, thank you for your consideration.

If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 235-3390 or dsmith@cuna.coop.

Sincerely,



Damon Y. Smith
Senior Director of Advocacy & Counsel

¹³ See, e.g., <https://www.hud.gov/sites/dfiles/OCHCO/documents/19-14hsgml.pdf>.