May 10, 2021

Office of Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20052

Re: Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X (Docket No. CFPB-2021-0006 / RIN 3170-AB07)

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America’s credit unions and their more than 120 million members. On behalf of our members, we are writing regarding the Consumer Financial Protection Bureau’s (CFPB or Bureau) recent proposed rule, Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X (the Proposed Rule).1 CUNA supports the Bureau’s amendments regarding streamlined modifications, as they will facilitate transitioning borrowers from forbearance to paying status effectively and efficiently. CUNA also has no objection to the Bureau’s amendments regarding live contact and reasonable diligence, though it recommends a necessary change to make the rule workable. CUNA strongly objects to the Bureau’s proposed moratorium on foreclosures until 2022 as this is unnecessary, unsupported, in direct contravention to RESPA, and unconstitutional.

Background

Since the beginning of the COVID-19 pandemic and the resulting economic crisis, credit unions have maintained their focus on their mission and members. Credit unions have provided forbearances, modifications, emergency loans, fee waivers, and continue to report a wide variety of monetary donations and participation in other community assistance programs.2 While some forbearances are required by law, credit unions are also proactively offering assistance and forbearance on loans not entitled to federal protections, out of care and concern for their members and local community. Credit unions are serving the specific needs of their memberships, based on

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the pandemic’s effect on their local community, industries, and economies. Credit unions are stepping up in the communities that need it most - advancing financial inclusion and access through the roughly 70% of credit union branches located in racially/ethnically diverse areas, as compared to roughly 60% of bank branches.  

At the same time, Congress, federal regulatory agencies, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Mortgage Loan Corporation (Freddie Mac) have issued a wide variety of protections, regulatory flexibilities, and relief programs directed at borrowers. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which was signed into law on March 27, 2020, provides up to 360 days of forbearance for mortgage borrowers with federally backed mortgages who are experiencing financial hardship in connection with the pandemic.

The Federal Housing Administration (FHA) has expanded its forbearance programs beyond the requirements of the CARES Act, allowing borrowers to remain on forbearance for two additional three-month periods if timely requested. Borrowers who request these extensions could have a full 18 months of forbearance. The FHA also established a moratorium on foreclosures of loans it insures and extended that moratorium through June 30, 2021. When foreclosures can proceed, the FHA has extended its deadline for first legal action to 180 days, or until December 27, 2021, to allow mortgage servicers of FHA loans plenty of time to consult with borrowers before initiating foreclosure.

Similarly, the Department of Veterans Affairs (VA) and Department of Agriculture (USDA) have announced they also expanded their forbearance programs for two additional three-month periods. This also permits borrowers experiencing hardship a total maximum of 18 months of forbearance if timely requested. Both agencies also currently have a foreclosure moratorium in place until June 30, 2021.

In order to align their policies with these federal government regulators and ensure consistency for homeowners, Fannie Mae and Freddie Mac (the government-sponsored enterprises (GSEs)) under

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3 NCUA, FDIC, and U.S. Census, University of Wisconsin, Applied Population Lab and CUNA analysis and calculations.
6 Id.
7 Id.
8 VA, VA Extends Existing Moratoriums on Evictions and Foreclosures and Extends Loan Forbearance Opportunities (February 16, 2021) available at https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5620.
the conservatorship of the Federal Housing Finance Agency (FHFA), have also made available two three-month forbearance extensions beyond the CARES Act, if timely requested. These extensions similarly would permit borrowers a full 18 months of forbearance. The GSEs have also issued and repeatedly extended their own foreclosure moratoriums, which currently run through June 30, 2021.

The CARES Act and the offered forbearance extensions permit borrowers to defer payments missed during forbearance to the end of a loan without accruing any additional interest or late fees. Borrowers who reenter full employment at the same rate are therefore able to seamlessly resume payments without any interruption. For borrowers whose income does not resume at the same level, the FHA, VA, USDA, and the GSEs offer streamlined modification programs to assist borrowers in reentering a payment status quickly and with significantly reduced information and documentation.

The Proposed Rule proposes several amendments to the loan servicing requirements of Regulation X intended to assist borrowers exiting forbearance and seeking to resolve any delinquency and reenter paying status. First, the proposal seeks to establish a “special pre-foreclosure review” until December 31, 2021, during which time mortgage servicers will not be permitted to initiate foreclosure on any property considered the borrower’s principal residence.

Secondly, the Proposed Rule would temporarily permit mortgage servicers to offer certain streamlined loan modifications based on an incomplete application. Currently, the servicing requirements contained in Regulation X 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. The Proposed Rule provides an exception from this requirement for certain streamlined loan modification options made available to borrowers with COVID-19-related hardships based on the evaluation of an incomplete application.

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12 Proposed Rule at 18841.

13 Id.

14 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).
Finally, the Proposed Rule amends the requirements for early intervention and reasonable diligence obligations. These changes are intended to ensure that servicers are communicating timely and accurate information to borrowers about forbearance and loss mitigation options, particularly as they exit forbearance.

**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.” 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 the last two quarters of 2020, credit unions approved $1,180,254,624 in workouts for members. They stand ready to approve much, much more.

In a letter sent shortly after President Trump declared a national emergency for COVID-19, CUNA President & CEO Jim Nussle called for the 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.”

We appreciated the CFPB’s responsiveness to that request, as shown through participation in a Joint Statement, compliance guidance clarifying existing regulatory flexibility, and promulgation of an interim final rule easing credit unions’ ability to offer forbearance options in the summer of 2020. The Bureau’s proposal to permit credit unions to offer streamlined loan modification options based on the evaluation of an incomplete application is exactly what is needed to easily transition borrowers who cannot resume their contractual payments from forbearances to paying status. While we acknowledge that many smaller credit unions are exempt from the requirements at issue in this notice due to qualification as a “small servicer,” we are pleased that covered credit unions and their impacted borrowers have benefited from the relief

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16 Proposed Rule at 18842.
23 Proposed Rule at 18841.
afforded by this timely update to Regulation X. The proposed amendments will ensure that borrowers can quickly and easily transition to a paying status on their mortgage, protecting their homes, credit scores, and financial security. This will also present the least amount of strain on credit union capacity and liquidity.

In regard to the early intervention requirements proposed by the Bureau, section 1024.39(e)(2) should be altered to remove the reference to “the last live contact” and replace it with “a live contact no later than 30 days prior to the expiration of the borrower’s current forbearance period.” Mortgage servicers cannot be certain of when a particular contact will be the “last live contact” with a borrower. Beyond this change, CUNA does not object to these provisions. Credit unions report that this requirement and the amendments to reasonable diligence efforts do not represent an additional burden. Credit unions are already proactively informing members about available assistance programs and continue to serve their members in a manner compliant with law, regulation, and their member’s expectations.

However, as the Bureau considers feedback on the proposed amendments, CUNA strongly cautions it against imposing additional servicing requirements on mortgage servicers. As discussed further below, mortgage servicers report that policy changes are currently the primary drain on servicer capacity. Implementing emergency borrower relief programs is a tremendous lift for compliance, member-service, lending, and other credit union staff. Additional technical changes to existing regulations adds another layer of complication, need for training and opportunity for error.

Finally, regarding the proposed moratorium on foreclosures, the Bureau’s proposal is unnecessary, overbroad to the point of being unconstitutional, and adds additional complexity at a time when it is least needed. The federal government agencies and the GSEs, under the conservatorship of the FHFA, first initiated a foreclosure moratorium in March of 2020, when the pandemic initially began. These entities have worked together to consistently extend these foreclosure moratoriums during the course of the pandemic, based on their review of the market and the economy. The moratoriums currently run through June 30, 2021, and no announcement has yet been made as to whether these will be extended further. It is not clear whether the Bureau believes these entities will not extend moratoriums further, or whether it believes they are no longer capable of judging when extensions of the moratoriums are appropriate.

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24 Proposed Rule at 18878.
25 Id.
The Proposed Rule’s Foreclosure Moratorium and Servicer Capacity

The Bureau’s proposed “special pre-foreclosure review period” is simply a foreclosure moratorium. The Proposed Rule does not require any special pre-foreclosure review to take place during this period – it is simply a prohibition on the initiation of foreclosure until 2022. It is predicated on the belief that when a massive number of consumers roll off of forbearance at the same time, the vast majority of mortgage servicers’ capacity will be stretched so thin that they will be unable to meet their existing regulatory obligations under RESPA and Regulation X, resulting in both regulatory violations and avoidable foreclosures. This is not reflective of credit unions’ experiences or forecasts for 2021 and 2022.

While a significant number of loans will be rolling off forbearance in the next year, credit unions are confident in their servicing capacity and believe many loans will return to a paying status quickly. The Bureau’s assessment of servicers’ capacity is inaccurate and, worse, fails to recognize the role the Bureau plays in capacity considerations. Finally, the Bureau fails to account for the role that a steady, rolling pace of foreclosure initiation can serve to resolve certain delinquencies without harms to their larger communities. The Bureau’s foreclosure moratorium should not be finalized, and the Bureau should allow credit unions to work directly with borrowers and determine when foreclosure is appropriate based on those conversations and available guidance from the FHA, VA, USDA, Fannie Mae and Freddie Mac.

The Bureau’s Proposal Likely Overstates the Volume of Loans Exiting Forbearance at Once

Credit unions have been proactively working with their members throughout the pandemic. For loans not covered by the CARES Act, credit unions have been working directly with borrowers to modify loans. In fact, 77% of credit unions report that they expect that the volume of modifications for these loans will not see any increase in 2021, in large part because without forbearances, credit unions have already worked with these borrowers to ensure they can stay in their homes.

Loans covered by the CARES Act will begin to roll off forbearance in 2021, however, in reality, the volume of loans exiting forbearance is likely to be far more spread out than described by the Bureau. Black Knight data, cited by the Bureau, indicates that of the 1.2 million forbearance plans scheduled to expire in March of 2021, “roughly half” or 600,000 reached their 12-month period allotted by the CARES Act. In April 2021, less than 500,000 plans expire, and it appears the Bureau assumes roughly the same portion of April expirations will hit the limits of the CARES Act as well. The Bureau cites the combined volume of approximately 800,000 loans that will be

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31 It should be noted that this includes loans serviced by small servicers which are exempted from the Proposed Rule’s moratorium against foreclosures. The Bureau recognizes this in footnote 174 of the Proposed Rule, which it
entitled to two additional forbearance extensions from Fannie Mae, Freddie Mac, HUD, FHA, USDA or VA.\textsuperscript{32} Therefore, the Bureau concludes 800,000 loans will exit forbearance in September and October of 2021.

However, roughly 25\% of these loans in active forbearance are non-GSE, non-FHA, non-VA loans held in portfolio, private labeled securities, or by other entities.\textsuperscript{33} These currently do not qualify for the additional six-month extension of forbearance, meaning servicers have already begun reaching out to borrowers and will continue to review loss mitigation options for these loans throughout the spring and summer. Further, the Bureau’s estimate presumes that 100\% of borrowers will request both three-month extensions, though the Bureau later recognizes it remains unclear how many borrowers will actually exit forbearance at twelve months.\textsuperscript{34} It should also be noted that the Bureau does not know whether additional forbearance may be offered by the GSEs and federal agencies, or whether foreclosure moratoria may be extended.

Most significantly, the Bureau’s estimate presumes that none of these loans will exit forbearance early, despite rising vaccination rates and the likely improvement of the economy anticipated over the next five to six months. Between October 2020 and March 2021, the unemployment rate in the U.S. has slowly declined from 6.9 to 6.0 percent.\textsuperscript{35} In the following nine months, the Federal Reserve projects the unemployment rate to fall to 4.5\% as vaccination rates help the labor market recover more quickly than previously forecasted.\textsuperscript{36} It is reasonable to assume that as borrowers go back to work in 2021, loans will increasingly exit forbearance on a rolling basis prior to September and October of 2021.

While there are certainly a high volume of loans in forbearance, and servicers will certainly experience an increase in volume in connection with the expiration of forbearances, in reality, these loans will likely exit forbearance in a much less concentrated timeframe than the Bureau asserts. As such, it is unlikely that a significant portion of the mortgage servicing industry will be under such strain that institutions will be unable to meet regulatory obligations under RESPA and Regulation X.

\textit{Comparisons to the 2008 Mortgage Crisis Are Inaccurate}

The Bureau has also indicated that it believes the volume of loans exiting forbearance will be similar to that at the height of the 2008 mortgage crisis. This is simply not an apples-to-apples

\textsuperscript{32} Proposed Rule at 18841.
\textsuperscript{33} Black Dec. 2020 Report at 8.
\textsuperscript{34} Proposed Rule at 18845.
comparison. While the volume of loans in forbearance is significant, credit unions fully expect that once these loans roll off forbearance, the number of loans in delinquency will be far less. Delinquency rates for credit unions for 2021 are forecasted at 0.65%. \(^{37}\) Delinquency rates for 2022 are forecast even lower, at 0.60%. \(^{38}\) Forecasts for both 2021 and 2022 are lower than the five-year average of 0.74%. \(^{39}\)

Credit unions report that their members have generally been more proactive and communicative than was experienced during the 2008 mortgage crisis. In the initial stages of the pandemic, many credit union members proactively protected their finances in the face of tremendous uncertainty and opted for forbearance as a preventative measure. Credit unions have consistently reported that, based on their outreach to members, many mortgage loans currently in forbearance are expected to return to paying status immediately. Missed payments will be deferred as described by the Bureau’s interim final rule on payment deferral options,\(^{40}\) and payments will begin immediately without the need for additional modifications or loss mitigation. For these loans, significantly less loss mitigation servicing is required.

For members who continue to experience financial hardship, credit unions report that the broad availability of streamlined modification programs from Fannie Mae, Freddie Mac and government agencies significantly lower the hurdles for borrowers to reenter a paying status. These represent 75% of the pipeline of loans in forbearance. The reduction in needed documentation and streamlined processes of these modification programs significantly reduce the workload on mortgage servicers compared to the 2008 mortgage crisis. Further, with the regulatory flexibility offered by the Bureau regarding incomplete applications in the Proposed Rule,\(^{41}\) credit unions expect that most loans will be quickly and easily returned to paying status.

The number of borrowers unable to immediately return to a paying status and left in delinquency is therefore expected to be proportionally small. Even among these, credit unions display confidence in the ability to resolve the vast majority of these delinquencies while keeping borrowers in their homes. Home values remain high and are predicted to increase another 6.6% this year. \(^{42}\) This means that unlike in the 2008 mortgage crisis, borrowers likely have equity in their homes. The Federal Reserve has continued to purchase $40 billion in mortgage-backed securities each month and has committed to keeping rates low through 2021. \(^{43}\) Thus, borrowers in


\(38\) Id.

\(39\) Id.

\(40\) Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA)(Regulation X), supra 22.

\(41\) Proposed Rule at 18841.


lengthy delinquencies should have flexibility to modify or refinance their loans at a low interest rate when they reenter employment as the economy picks up. Those unable to do so will likely have the ability to sell homes quickly and at a good price throughout 2021.

Without significant data supporting the Bureau’s supposition that mortgage servicers will be too strained to cope with the volume of loans requiring assistance, the Bureau should not interfere with investor and insurer instructions or the servicing of loans in credit unions’ portfolios. Credit unions should be permitted to work directly with their members as they have done throughout the pandemic, resolve delinquencies with as many tools as possible, and make the appropriate determination that sometimes foreclosure is unavoidable. Where foreclosure is unavoidable, credit unions should be permitted to foreclose on a loan without undue delay.

The Bureau Is Solving the Wrong Problem Related to Capacity

The Bureau repeatedly states that it believes servicer capacity may be strained resulting in delays or errors in processing loss mitigation requests. While the Bureau could theoretically cite to its own experience in examining mortgage servicers or consumer complaints if it believes that servicers are not adequately prepared, it does not do so. The Bureau cites only one source to support this fear – a discussion of the Fannie Mae Mortgage Lender Sentiment Survey in which 34% of respondents identified customer-facing staffing capacity as a challenge during the pandemic. This should not be a surprise given that staff at mortgage servicers are organizations of people. Credit union staff are all individuals and have had their own difficulties during the pandemic and may have fallen ill, had to take care of ill family members, grieved the loss of those family members, lost day-time child care, or been restricted by remote working and technological limitations. These concerns will become less relevant as more staff and their families are able to be vaccinated and in-person child-care and work is increasingly available.

In the same survey cited by the Bureau, respondents indicated that they were compensating for these difficulties by offering websites with mortgage relief information. While only 34% reported experiencing staffing challenges, 60% of respondents reported a reduction in call center volume due to the availability of mortgage relief information available on the website. Further, in comparing the current crisis to the height of the 2008 mortgage crisis, survey respondents also felt that they were better positioned to help homeowners overcome hardship and stay in their homes than in 2008. The most widely reported challenge for servicers was not staff or capacity—it was keeping up with policy changes from investors.

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46 Id.
47 Id.
48 Id.
What is draining servicer capacity is not calls from borrowers—it is the ever-shifting landscape of overlapping policy changes, legislation, and rulemakings from investors, federal regulators, and state and Federal legislatures. Credit unions must digest these changes, establish compliant polices and procedures to operationalize them, and then disseminate changes to staff and ensure they are adequately trained. In 2020, credit union staff was absorbing and operationalizing these changes on a weekly, and sometimes daily basis, against a backdrop of tremendous stress, loss, and uncertainty.

It is notable that on March 31, 2021, the Bureau issued rescissions of regulatory flexibilities that improved capacity for financial institutions, stating it sees no need for those flexibilities as financial institutions have established the necessary capacity to serve American consumers in accordance with regulatory expectations. For example, the Bureau rescinded temporary policies offering flexibility for servicers on certain obligations, such as the largely administrative requirement to file credit card agreements with the Bureau. In doing so, the Bureau stated:

> Based on the Bureau’s market monitoring, the Bureau believes that companies, including credit card and prepaid account issuers, have had sufficient time to adapt to the pandemic and should now be able to respond to consumers’ need to access credit and other funds while complying with the data submission obligations under TILA, Regulation Z, and Regulation E without the flexibility afforded under the Statement.

This rescission, along with six others, were issued with no notice and with effect in less than 24-hours. The rescissions covered a variety of business areas and requirements. This left staff with no time to disseminate information or make a plan to catch up on any delayed tasks, forcing credit unions to divert staff time from helping members to achieving immediate compliance.

On April 5th, less than a week later, the Bureau issues a proposed rulemaking stating it is concerned about servicer capacity to assist homeowners in compliance with the existing requirements of Regulation X. In that proposal, the Bureau cites as support for its concerns a blog post that

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51 Id.

52 Black Knight, p 8.

53 Proposed Rule at FN 175.
specifically states that policy changes are the biggest challenge on servicer capacity.\textsuperscript{54} The Bureau’s solution to this anticipated lack of capacity to assist homeowners is to erect additional temporary prohibitions and notification requirements. The Bureau cannot have it both ways.

Since passage of the \textit{Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010} (the \textit{Dodd-Frank Act})\textsuperscript{55} and in direct response to mortgage servicing failures during the 2008 mortgage crisis, the Bureau has repeatedly revised the mortgage servicing rules to provide greater protections for borrowers including multiple points of contact with delinquent borrowers,\textsuperscript{56} standardized loss mitigation procedures to ensure fair review of applications,\textsuperscript{57} a prohibition against dual tracking\textsuperscript{58} and generalized requirements that mortgage servicers have sufficient staffing, processes and procedures to meet the needs of borrowers.\textsuperscript{59} Mortgage servicers have implemented these processes, trained their staff, and been examined for compliance with requirements. Procedures have been practiced and tested. If these requirements are insufficient, the Bureau can consider a rulemaking process to amend them, however, adding to these requirements with additional notices, waiting periods, and complexities in the midst of a crisis and citing limited servicer capacity as the reason for changes is like suggesting a roller coaster is the best medicine for nausea. If the Bureau truly wishes for successful outcomes on these mortgages, it must stop exacerbat

The Bureau suggests that the Proposed Rule take effect on or before August 31, 2021, and sets a hard expiration date of the foreclosure moratorium at December 31, 2021, at which time mortgage servicers would be permitted to take first legal action to initiate a foreclosure. This means that on a single day in January, the flood gates could open for foreclosure initiation on all delinquent mortgage loans that rolled off forbearance in the months of September, October, November, and December. Mortgage servicers can continue to offer modifications, deferral plans, and other workouts during these months regardless of the Bureau’s rule. Therefore, allowing delinquent mortgages to amass and then permitting filing on the first day of the year doesn’t solve a capacity problem – it creates a capacity problem. If the Bureau’s true concern is servicer capacity, then this is a facially absurd result.

\textit{Avoidant Borrowers and Vacant and Abandoned Property}

Unfortunately, there will always be a certain number of borrowers who avoid their lender until foreclosure starts. While credit unions report that this experience is significantly less common than during the 2008 mortgage crisis, some people are simply avoidant when under stress. This is especially true of borrowers who feel certain they are unable to resolve the delinquency. These borrowers sometimes chose to leave the property to move in with family or make other

\footnotesize{\textsuperscript{54} Proposed Rule at 18875.  
\textsuperscript{55} Public Law 111-203, 124 Stat. 1376 (2010).  
\textsuperscript{56} 12 Code of Federal Regulations §§1024.39-1024.40.  
\textsuperscript{57} 12 CFR §1024.41.  
\textsuperscript{58} 12 CFR §1024.41(f).  
\textsuperscript{59} 12 CFR §1024.38.}
arrangements for their housing without informing their lenders. This leaves lenders without the necessary information to determine whether the property is still the borrower’s principal residence, is vacant, or is abandoned.

The Proposed Rule prohibits a mortgage servicer from initiating foreclosure on a borrower’s principal residence, regardless of whether it is vacant or abandoned. The question of whether a property is a borrower’s principal residence itself depends on the specific facts and circumstances regarding the property and applicable state law. Ultimately, a property can be effectively abandoned, unsecured, and un cared for and still be a borrower’s principal residence under relevant law. The Bureau recognizes this reality when it states that vacant property may still be a borrower’s principal residence and abandoned property might not. The relationship between a property’s current occupation and legal status as a primary residence often becomes incidental in cases of financial strain and hardship, where borrowers leave the property to move in with family or make other arrangements.

The practical result of ignoring this reality is that mortgage servicers will be prohibited from initiating foreclosure to protect collateral where it is unoccupied. Foreclosure in some jurisdictions can still take years. Research shows that vacant properties have a greater impact on adjacent properties than foreclosures. Blighted property has real social effects, especially for low- and moderate-income neighborhoods, which are more likely to be affected by squatters and decreases in property values. Currently, property values are high which gives borrowers unable to resolve delinquencies the opportunity to sell the property without fear of owing a deficiency. While property values are expected to remain high throughout 2021, it is not clear how long that may be the case.

As previously stated, credit unions report that members have generally been proactive and communicative during the pandemic. For avoidant borrowers, continuing to push the timeline of foreclosure out can do more harm than good. It is not uncommon for avoidant borrowers to remain avoidant until legal action is initiated. Delaying foreclosure lengthens the period of delinquency, making it more difficult for the borrower to recover in the loan. The longer the delinquency, the more likely that the borrower will choose to abandon the house. Further, by releasing all potential foreclosure filings on January 1, 2021, the Proposed Rule may reduce mortgage servicer capacity to assist these borrowers whose foreclosure cases would all be happening in lockstep. This would be especially unfortunate, as often these are the borrowers that need the most support and multiple loss mitigation application reviews, and are more likely to have success if they feel that momentum has been generated. Allowing mortgage servicers to initiate foreclosure and service these loans at a steady pace is far more preferable than the Bureau’s all-or-nothing approach.

60 Proposed Rule at FN 9.
61 Proposed Rule at FN 9.
63 Id. at 13.
64 Id. at 14.
The Bureau states that it is concerned about an exemption for abandoned property because the exemption would require a fact-specific analysis and could be used to circumvent the 120-day prohibition. However, the Bureau also states that the determination of “principal residence” is a fact-specific analysis. The Bureau does not clarify why one fact-specific analysis is preferential over the other. The Bureau recognizes that mortgage servicers will expend costs to ensure that a property is not a borrower’s principal residence, particularly when vacant or abandoned, and that these determinations are difficult. However, the Bureau provides no justification as to why a determination that a property is vacant or abandoned is itself insufficient to justify a foreclosure moving forward to the stage of first filing.

Where mortgage servicers have made good faith efforts under Regulation X to contact borrowers but have been unable to do so, and there are facts and circumstances that indicate the property may be vacant or abandoned, such as returned mail and drive-by inspections results, initiating foreclosure is an appropriate next step. The action of initiating service of process often clarifies whether the property is the borrower’s primary residence. Occasionally, it clarifies that the borrower is deceased, and that the borrower’s estate was not far enough along to manage the property.

The Bureau refers to moratorium as a “final backstop” to ensure that borrowers affected by COVID-19 can be evaluated for loss mitigation before foreclosure, however, foreclosure is often a lengthy process, sometimes taking multiple years to complete. Under Regulation X’s requirements, borrowers are entitled to apply for loss mitigation after the first legal action has been initiated, are protected from a foreclosure moving forward while their application is pending, and can appeal any loss mitigation determinations they believe are in error. A prohibition on filing first legal is hardly the “final backstop” against the foreclosure sale.

Finally, the filing of first legal often gets the attention of avoidant borrowers who then contact their credit union. Allowing foreclosure to be initiated in these circumstances is appropriate and should not be delayed. Borrowers and their successors in interest will still be entitled to the protections of RESPA and Regulation X, including the prohibition against dual tracking and the right to an appeal if a mistake was made during the loss mitigation process.

**Authority and Constitutionality Issues Related to the Proposed Foreclosure Moratorium**

The Bureau should very seriously reconsider whether it has the legal authority to issue this moratorium and, if so, whether doing so violates the constitutional rights of the financial institutions the Bureau regulates.

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65 Proposed Rule at 18867 and FN 140.
66 Proposed Rule at FN 9.
67 Proposed Rule at 18873.
68 See 12 CFR § 1024.41.
The Bureau’s Legal Authority to Issue a Broad Foreclosure Moratorium

The Bureau cites as its authority to issue the foreclosure moratorium the consumer protection purposes of RESPA including “ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers prevent avoidable costs and fees, and facilitating review for foreclosure avoidance options.” Since the passage of the Dodd-Frank Act, the Bureau has issued significant procedural safeguards in mortgage servicing to specifically address these issues. Mortgage servicers are required to maintain policies and procedures that are reasonably designed to ensure they provide timely and accurate information to borrowers and to properly evaluate loss mitigation applications to avoid preventable foreclosure. 69 Mortgage servicers are regularly examined for their compliance with these standards.

The Bureau now states that these procedural safeguards may not be sufficient to facilitate review for foreclosure avoidance. 70 The Bureau is concerned about borrowers’ present ability to obtain and understand important information on avoidance options available to them. The Bureau provides no evidence regarding borrowers’ failure to understand and obtain information. The tremendous number of loans in forbearance cited by the Bureau indicates the opposite. This aligns with credit unions’ experiences that borrowers have largely been proactive and communicative. Further, the Bureau provides no explanation of why borrowers cannot understand this information in October 2021, but will be able to understand it by January 1, 2022. The Bureau’s fear that a significant volume of loans will strain mortgage servicer capacity is also overstated and unsupported by forecasts and credit union experiences.

Further, RESPA clearly states that none of its provisions shall affect the enforceability of a loan agreement or mortgage made in connection with a mortgage loan covered by RESPA. 71 The Bureau’s existing pre-foreclosure review period establishes a minimum period of delinquency before first legal can be initiated, 72 with the express purpose of allowing consumers an opportunity to pursue loss mitigation opportunities prior to the initiation of foreclosure proceedings. 73 This review period is explicitly tied to each individual loan’s delinquency period. 74 It is tailored to permit a specific, limited period during which a borrower has the opportunity to submit a complete application which then prevents the foreclosure from being initiated until the application has been reviewed. 75 In comparison, the Bureau’s foreclosure moratorium in the Proposed Rule applies regardless of the length of delinquency. It is triggered simultaneously on all loans and expires simultaneously on all loans. If this period is intended to provide an opportunity to initiate loss mitigation before first legal, that period will vary in length from loan to loan, depending on when

69 12 CFR §1024.38
70 Proposed Rule at 18874.
71 12 USC § 2615.
72 12 CFR §1024.41(f)(1)(i).
73 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 FR 10695, 10819 (February 14, 2013).
74 See 12 CFR §1024.41(f)(1)(i).
75 See 12 CFR 12 CFR §1024.41(f)(2).
the loan became delinquent and whether the borrower was on forbearance or not. It may provide one borrower with an extra week and another with four months. The Bureau’s foreclosure moratorium is not tailored to ensure borrowers’ have a fair opportunity at loss mitigation—indeed extended periods of forbearance already provide that exact opportunity. The Bureau’s foreclosure moratorium is simply intended to prevent foreclosure filings. This purpose is in direct contravention to RESPA itself—which cannot be used to affect the enforceability of loan agreements or mortgages for its covered loans.\textsuperscript{76}

Regulation X provides an extremely robust framework for servicing mortgage loans, including very detailed and prescriptive requirements for outreach, notifications, loss mitigation review, and a loss mitigation appeals process. It prevents mortgage servicers from proceeding with foreclosure when a complete loss mitigation application has been filed. Further, state laws also provide consumer protections. It appears that the Bureau’s goal is simply to stop any foreclosures for a few more months during which increasing vaccination rates and economic improvements will better situate more borrowers to qualify for workouts and avoid foreclosures. While understandable, this is ultimately outside of the Bureau’s authority and is explicitly prohibited by the law. The Bureau should not finalize the foreclosure moratorium.

\textit{The Constitutionality of the Proposed Foreclosure Moratorium}

As the Supreme Court explained during the worst year of the Great Depression, the mere fact of an emergency does not increase constitutional power, nor diminish constitutional restrictions:

\begin{quote}
Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.\textsuperscript{77}
\end{quote}

Courts across the country, in ruling on COVID cases, have reiterated these rulings.\textsuperscript{78}

The forbearance periods under the CARES Act and investor requirements are of a different legal nature than the foreclosure moratorium in the Bureau’s Proposed Rule. The CARES Act provides up to 360 days of forbearance for mortgage borrowers with “federally backed mortgage loans” who request forbearance from their servicer and attest to a financial hardship during the COVID-19 emergency.\textsuperscript{79} The CARES Act provision was limited to mortgages owned or insured by the federal government.\textsuperscript{80} The Proposed Rule’s foreclosure moratorium would generally prohibit

\textsuperscript{76} See 12 USC § 2615.
\textsuperscript{77} Home Building & Loan Ass’n v. Blaisdell, 290 U.S. 398, 425 (1934).
\textsuperscript{78} See, e.g., Tandon v. Newsom, No. 20A151, 2021 WL 1328507 (Apr. 9, 2021); Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020); Ill. Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020).
\textsuperscript{79} Supra 4.
\textsuperscript{80} The CARES Act defines a “federally backed mortgage loan” as any loan which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one-to-four families that is insured by the Federal Housing Administration under title II of the National Housing Act (12 U.S.C. 1707et seq.); insured under section 255 of the National Housing Act (12
servicers of all mortgages from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until after December 31, 2021. This restriction would be in addition to existing section 1024.41(f)(1)(i), which prohibits a servicer from making the first notice or filing required by applicable law until a borrower’s mortgage loan obligation is more than 120 days delinquent. While the CARES Act restriction is a condition tied to a federal benefit, the CFPB’s regulation is a command enforceable by law.

As explained in further detail below, the Bureau’s Proposed Rule restricts commercial speech and impedes access to the courts. When servicers contact consumers about the consequences of non-payment, they are engaging in non-deceptive commercial speech, which is protected by the First Amendment. Additionally, servicers have a First Amendment right to petition the government, which includes access to the courts. Thus, an infringement of that right is constitutionally suspect. By restricting the exercise of servicers’ legal rights to engage in commercial speech and access the courts without providing a countervailing benefit, the Proposed Rule infringes on the constitutional rights of loan owners and investors and thus is vulnerable to a First Amendment challenge.


a. Restrictions on Commercial Speech

Commercial speech is defined as “expression related solely to the economic interests of the speaker and its audiences.”\(^{81}\) Although commercial speech is not protected to the same extent as political speech under the First Amendment, the government may not regulate “truthful, nonmisleading commercial messages” absent proper justification that passes intermediate scrutiny by the courts.\(^{82}\)

The Supreme Court has prescribed the four-prong Central Hudson test to determine whether a governmental regulation of commercial speech satisfies intermediate scrutiny is thus constitutional. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. “If both inquiries yield positive answers,” then to be constitutional the restriction must (3) “directly advance[ ] the governmental interest asserted,” and (4) be “not more extensive than is necessary to serve that interest.”\(^{83}\)

Even assuming the Bureau’s Proposed Rule can satisfy the first three prongs of the Central Hudson test, its ability to satisfy the fourth prong is doubtful. Despite the more lenient standard of review applied to the regulation of commercial speech, the U.S. Supreme Court often strikes down


\(^{83}\) Central Hudson, 447 U.S. at 566.
commercial speech regulations that burden too much speech, particularly if the speech is neither false nor misleading. In *44 Liquormart, Inc. v. Rhode Island*, the Court struck down a state statute that prohibited disclosure of retail prices in advertisements for alcoholic beverages. In the process, the Court made clear that a total prohibition on “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process” will be subject to a stricter review by the courts than a regulation designed “to protect consumers from misleading, deceptive, or aggressive sales practices.” The Court added, “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”

Courts have made it clear that the government may require commercial speakers to provide additional factual information along with their commercial messages, as long as the disclosure requirement is reasonably related to the government’s interest. But the CFPB’s rule here is not a disclosure, it’s a restriction. Thus, the rule is more constitutionally suspect.

Furthermore, the CFPB’s Proposed Rule goes beyond what is necessary to achieve the substantial government interests set forth by the Bureau. For instance, the Proposed Rule does not take into account the existing terms of the loans or make distinctions between federally underwritten or private loans. In this way, the Proposed Rule goes far beyond the deferral mandated in the CARES Act. First, the Bureau’s moratorium applies to all loans—not just loans that the government owns. The federal government is the sponsor or underwriter of the loans presently in deferment due to COVID, and this section of CARES applies only to servicers of 1-4 family federally backed mortgage loans (with no application to 5-family or more). Second, the federal government permits multifamily landlords whose properties are financed with a Freddie Mac Multifamily to defer federal loan payments for 180 days (and up to one year) by showing hardship because of COVID-19. Further, the Proposed Rule is not sufficiently tailored. It does not distinguish delinquencies that pre-date the pandemic, previously conducted outreach, the results of loss

84 See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 510 (1993) (striking down a Cincinnati regulation that banned news racks on public property if they distributed commercial publications); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down a Florida law banning solicitation by certified public accountants); *Edge Broadcasting*, 509 U.S. at 418 (upholding federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery); *Ibanez v. Fla. Bd. of Accountancy*, 512 U.S. 36 (1994) (holding that the Florida Board of accountancy could not prohibit a Certified Public Accountant from stating that she was a certified public accountant in her advertisements); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down 27 U.S.C. § 205(e), which prohibited beer labels from displaying alcohol content unless state law required the disclosure, because the regulatory scheme was irrational); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding a rule that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster).


86 Id.

87 Id. at 501. The nine justices were unanimous in striking down the law, which prohibited advertising the price of alcoholic beverages, but only parts of Justice Stevens’ opinion for the Court were joined by a majority of justices. The quotations above, for example, are from Part IV of the Court’s opinion, which was joined by only Justices Kennedy and Ginsburg besides Justice Stevens.

88 See supra 4 at 4022(a)(2), 4024(a)(4)(A).

89 See id. §§ 4022(b), 4022(c)(1).
mitigation application processes, or the occupancy status of the property. By imposing greater restrictions on servicers than is necessary to achieve the interests raised by the Bureau, the foreclosure moratorium is not sufficiently tailored to survive intermediate scrutiny.

b. Right to Petition

In addition to infringing on commercial speech protections, the Bureau’s Proposed Rule impacts the First Amendment’s guarantee of the right to petition the government for redress of grievances. The First Amendment provides that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” The constitutional guarantee of the right of citizen access to the courts, state and federal, has been identified by the United States Supreme Court as “among the most precious of the liberties safeguarded by the Bill of Rights.” As reiterated by the Court most recently in Borough of Duryea, Pa. v. Guarnieri:

This Court’s precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. “[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” SureTan, Inc. v. NLRB, 467 U.S. 883, 896-897; see also BE & K Constr. Co. v. NLRB, 536 U.S. 516, 525 (2002); Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972). . . . The right to petition applied to petitions from nobles to the King, from Parliament to the King, and from the people to the Parliament, and it concerned both discrete, personal injuries and great matters of state.

By prohibiting servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until after December 31, 2021, the Bureau’s Proposed Rule essentially blocks servicers from accessing the courts until 2022. Not only does this interfere with contractual rights under loan agreements, but it also implicates First Amendment concerns as described above.

Although the Bureau asserts that its authority to issue the foreclosure moratorium is derived from RESPA and the Dodd-Frank Act, it has not provided sufficient support that this rule is necessary for the consumer protection purposes of RESPA. The expansive and restrictive nature of the moratorium implicates constitutional concerns, particularly under the First Amendment. If finalized, the Bureau’s foreclosure moratorium may well be challenged as an overbroad restrictions on servicers’ commercial speech and an impediment to servicers’ access to the courts.

90 United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n, 389 U.S. 217, 222 (1967); see also California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (“The right of access to the courts is indeed . . . one aspect of the right of petition.”); NAACP v. Button, 371 U.S. 415, 433 (1963) (noting that First Amendment freedoms, including the right to petition, are “delicate and vulnerable, as well as supremely precious in our society” and therefore demand exacting protection).

Such a challenge would likely tie up the Bureau’s resources defending a temporary rule that would be rendered moot by a preliminary injunction. While the goals supported by the Proposed Rule are laudable, Bureau resources would likely be better spent elsewhere in this moment. It is unfortunate that the Bureau issued such a sweeping proposal rather than conduct outreach with stakeholders to discover what servicer capacity and borrower needs actually are so that it could propose a more tailored rule.

**Conclusion**

On behalf of America’s credit unions and their more than 120 million members, thank you for your consideration of this feedback. CUNA urges the Bureau to finalize the Proposed Rule’s provision regarding streamlined modifications and incomplete applications. If the Bureau finalizes the provisions regarding live contact and diligence, CUNA encourages the Bureau to make recommended changes so that the provisions can be operationalized.

Finally, CUNA urges the Bureau, in the strongest terms, to not finalize its provision establishing a foreclosure moratorium as doing so is unnecessary, the Bureau does not have the authority to promulgate the change, and the provision is likely unconstitutional. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 503-7184 or elaberge@cuna.coop.

Sincerely,

Elizabeth M. Young LaBerge
Senior Director of Advocacy & Counsel