American Bankers Association

Building Success. Together.

November 15, 2017

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
By electronic delivery to: www.regulations.gov

Re: Docket No. CFPB-2017-0031
Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)

Dear Ms. Jackson:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) interim final rule amending an important aspect of the CFPB's amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act, as implemented in Regulation X, at 12 CFR Part 1024 (the 2016 Final Rule). The interim final rule seeks to clarify the 2016 Final Rule provision related to the timing and frequency by which a mortgage servicer must send recurring written early intervention notices to borrowers who have invoked their cease communication rights under the Fair Debt Collection Practices Act (FDCPA).

General Comments:

ABA appreciates the Bureau's efforts to remedy a potentially problematic provision of the 2016 Final Rule. ABA shares the CFPB's concerns that, with respect to borrowers who have exercised their cease communication rights under the FDCPA, the 2016 Final Rule could be interpreted as requiring subsequent written early intervention notices to be provided precisely on the 180th day after the last notice was provided. As the CFPB noted in the interim final rule, this would have imposed too narrow a window for compliance, and could require servicers to send notices on Saturdays, Sundays and holidays. ABA generally believes that the revised timing and frequency structure for written early intervention notices in the CFPB's interim final rule alleviates the problems that otherwise would have occurred. In this sense, ABA is supportive of the Bureau's interim final rule.

While ABA is generally supportive of the CFPB's efforts to alleviate the confusion and challenges associated with the 2016 Final Rule, we still believe there are some scenarios where mortgage servicers could face uncertainty and unnecessary risk under the interim final rule.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

i. FDCPA Risk

Pursuant to the interim final rule, the determination as to whether or not a servicer has to send a subsequent early intervention written notice to a borrower who has invoked the FDCPA cease communication protections is made 180 days after the servicer previously provided the notice. At that time, if the borrower is 45 days or more delinquent, then another written notice must be provided no later than 190 days after the prior notice was sent to the borrower. In this scenario, the rule provides servicers a window between the 180th and 190th day in which to provide the subsequent written notice.

The rule as written does not account for a scenario where the borrower cures the delinquency shortly after the determination is made on the 180th day that a notice must be sent. For example, if, on the 180th day, a borrower is 46 days delinquent, the servicer would be required to send another notice no later than the 190th day, regardless of whether the borrower cured the delinquency the next day. On the 190th day, the servicer would send a written notice that likely included information suggesting the borrower is delinquent and that the servicer intends to invoke foreclosure. If the servicer relied upon the CFPB's model clause, the notice would say that the borrower is "behind on [his or her] mortgage payment," and that the servicer has "a right to invoke foreclosure." At the time the notice is generated, these statements would not be accurate.

While the CFPB's interpretive rule is designed to shield servicers from alleged violations of section 805(c) of the FDCPA, it does not provide any protection from section 805(e) of the FDCPA, which prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 805(e) also specifically prohibits the "false representation of the character, amount, or legal status of any debt," and the "threat to take any action that cannot legally be taken or that is not intended to be taken." ABA is concerned that sending a current borrower a written early intervention notice could be construed as violating section 805(e) of the FDCPA and similar state debt collection laws.

To further complicate matters, Comment 39(d)-2 in the Official Interpretations to Regulation X states that

> [a] servicer subject to the FDCPA must continue to comply with all other applicable provisions of the FDCPA, including restrictions on communications and prohibitions on harassment or abuse, false or misleading representations, and unfair practices as contained in FDCPA sections 805 through 808 (15 U.S.C. 1692c through 1692f).

As such, a servicer subject to the FDCPA could be placed in a precarious position if and when it is required to send a written early intervention notice to a borrower who is current.

ii. Timing of the Interim Final Rule

ABA also has concerns regarding the timing of the interim final rule. The CFPB released the interim final rule on October 4, 2017, and both the interim final rule and the 2016 Final Rule became effective on October 19, 2017 before the industry had an opportunity to comment on the changes. This 15-day period did not afford the mortgage servicing industry with sufficient time to digest the interim final rule and then implement the CFPB's modified structure before the law went into effect. It is also worth noting that the problematic early intervention requirements were released on August 4, 2016, fourteen months before the CFPB issued the interim final rule. While the industry certainly needed relief from the original timing requirements, it also needed an appropriate amount of time to change course and implement a new framework.

We recognize that many servicers may not be impacted by the changes effectuated through the interim final rule until they begin sending subsequent early intervention letters to borrowers who have invoked cease communication rights. If a servicer did not begin sending any early intervention notices to those borrowers until after the 2016 Final Rule and the interim final rule went into effect in October 2017, the servicer likely would not be required to send a subsequent notice until 180 or more days after the rule went into effect. In that scenario, the servicer still hasn't had to confront the timing issue that is addressed by the interim final rule. However, we note that nothing specifically prohibited a servicer from sending an early intervention notice to a borrower protected by the FDCPA cease communication provisions prior to the effective date. To the extent a servicer was already sending early intervention notices to those borrowers, the servicer may already be obligated to send a subsequent notice may have already happened since the interim final rule went into effect.

As such, ABA requests that the Bureau consider adding safe harbors from liability for any servicer who attempted to implement the CFPB's 2016 Final Rule in good faith. Without some form of relief, ABA believes that its membership may be subject to unnecessary risks through private litigation and supervisory actions by federal and/or state regulators. In our opinion, it would be appropriate for any safe harbors to cover servicer activity for a period of 180 days after the rule's effective date. To the extent the CFPB is unable, or unwilling, to provide protections to entities that were unable to successfully alter their operations within fifteen days, ABA requests that the CFPB issue a statement of supervisory policy to assure the industry that the CFPB will not enforce technical violations of the interim final rule provided that a servicer made good faith efforts to implement both the 2016 Final Rule and interim final rule in a timely manner.

iii. FDCPA Interpretive Rule

Finally, as a general matter, ABA requests that the CFPB ensure that the interpretive rule it issued concurrently with the 2016 Final Rule is accurate with respect to the early intervention requirements and consistent with the interim final rule. For example, ABA notes that the interpretive rule says that, with respect to a borrower protected by an FDCPA cease communication request, "the servicer is not required to provide [an early intervention written notice] to the borrower more than once during any 180-day period."[2] This suggests that a servicer is permitted to send more than one early intervention notice in those circumstances. However, in connection with that statement, the CFPB cites to 12 CFR 1024.39(d)(3), which actually provides that "[a] servicer is *prohibited* from providing the written notice more than once in any 180-day period." (emphasis added). As it currently stands, the CFPB's interpretive rule misstates the early intervention requirements, and should be updated accordingly.

Additional Comments:

ABA also believes that there are scenarios that could present operational challenges for mortgage servicers to comply with the interim final rule. We also believe there is an alternative approach that would be easier for servicers to manage operationally, and that would eliminate most, if not all, risks.

i. Revocation of A Cease Communication Request

Servicers could face operational challenges under the interim final rule in scenarios where a borrower attempts to revoke a previously submitted cease communication request shortly before the 180th day after the last early intervention written notice was sent. For example, if a borrower revokes the cease communication request, the servicer likely would no longer fall into the modified timing requirements of 12 CFR 1024.39(d)(3) and the servicer would once again be subject to the general timing requirements of 12 CFR 1024.39(b)(1). At that time, if the borrower is still 45 days or more delinquent, the servicer would be required to ensure that a written early intervention notice is sent again no later than the 180th day after the last notice was sent. If the revocation occurred on the 178th or 179th day, then the servicer would have

[2] 81 FR 71980 (Oct. 19, 2016).

one or two days to process the revocation and send an appropriate notice. ABA believes this creates an unreasonable scenario for servicers to manage operationally.

ABA also notes that there are no well-defined procedures or universal guidelines for determining when a consumer actually revokes a cease communication request. Questions may arise depending on whether the consumer attempts to revoke orally or in writing, and based upon the wording of the actual revocation request. Servicers may have to discern whether it is a limited revocation—such as for loss mitigation purposes—or a full revocation of the cease communication request and how all of that interacts with the early intervention requirements. Ultimately, this uncertainty makes it even more challenging for a servicer to quickly react to a revocation and switch back into the standard early intervention framework. These scenarios create uncertainty for mortgage servicers, and also elevate litigation risk since both the FDCPA and the early intervention requirements in Regulation X are enforceable through private litigation.

ii. Alternative Approach

To alleviate these risks, ABA recommends that the CFPB consider an alternative approach for early intervention notices to borrowers who have exercised FDCPA cease communication protections. Rather than include a timing restriction that forces servicers to utilize entirely different letter triggers for borrowers protected by the FDCPA cease communication provisions, the CFPB should enact a rule specific to the FDCPA cease communication context so that early intervention notices cannot be sent more frequently than once in any 170-day period. Similar to a normal borrower, if the borrower is 45 days or more delinquent on the 180th day after the last notice was sent, another notice would be required by the 180th day.

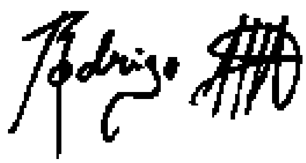
This alternative framework would allow servicers to make sure they only send early intervention notices at a point in time when the borrower is still delinquent. Servicers would also not be subject to the risk of sending notices with misleading, inaccurate, or threatening language at a point in time when the borrower is current on the mortgage loan obligation. Finally, by allowing servicers to send notices more frequently than once every 180 days, servicers would likely be able to align their standard early intervention processes and their process for borrowers who have invoked cease communication protections. This would hopefully eliminate the need for different triggers and would drastically simplify the overall rule. ABA hopes the CFPB will consider this alternative approach.

If the CFPB is unwilling to take the above-described preferred alternative approach, ABA requests that the CFPB add an additional provision to Regulation X or to the official interpretations to Regulation X that clearly states that, in the FDCPA cease communication context, a servicer is not required to provide a borrower with a subsequent early intervention written notice if the borrower is current by the 190th day after the last notice was sent. Although this type of change would not allow servicers to align their letter triggers for all borrowers and would not assist in the scenario where a cease communication request is revoked, it likely would alleviate much of the risks discussed above regarding providing inaccurate information to a borrower. ABA hopes that the CFPB will evaluate the potential risks servicers are faced with under the current framework, and consider adopting ways that would eliminate all such risks.

Conclusion:

ABA members appreciate the Bureau's continued focus on the mortgage servicing rules, and the opportunity to comment on the CFPB's interim final rule. We look forward to working with CFPB staff as it considers comments to this rulemaking. Please contact the undersigned if you have any questions regarding our comments on the proposal.

Sincerely,



Rod. J. Alba
Senior Vice President, Mortgage Finance
& Senior Regulatory Counsel