

**American Financial Servicers Association  
Consumer Mortgage Coalition  
Credit Union National Association  
HOPE NOW Alliance  
Independent Community Bankers of America  
National Association of Federally-Insured Credit Unions  
Real Estate Settlement Providers Council**

February 7, 2018

The Honorable John Michael Mulvaney  
Acting Director  
Consumer Financial Protection Bureau  
1700 G Street, N.W.  
Washington, D.C. 20552

Re: 2016 Amendments to the CFPB's RESPA and TILA Mortgage Servicing Rule –  
Periodic Statements in Bankruptcy

Dear Acting Director Mulvaney:

The above-listed trade associations are pleased to advise the CFPB on the significant unaddressed issues in the CFPB's 2016 amendments to the 2013 RESPA and TILA Mortgage Servicer Rule scheduled to go into effect in April 2018. The CFPB's final rule will require that mortgage servicers ("servicers") to send monthly billing statements to consumers in active bankruptcy cases and certain bankruptcy cases in which the debtor's personal liability was previously discharged.

The CFPB's disclosure requirements conflict with well-settled bankruptcy law prohibiting a creditor from collecting from consumers who are in an active bankruptcy case or who have previously been discharged from personal liability in a prior bankruptcy case. The automatic stay, found in Section 362 of the Bankruptcy Code, which prohibits such activity, has been cited by numerous Federal District and Bankruptcy courts across the country with regards to creditors who attempt to communicate with consumers in an active bankruptcy case.<sup>1</sup>

Moreover, Section 524 of the Bankruptcy Code prohibits creditors from attempting to collect against consumers who have previously been discharged from liability in a prior

---

<sup>1</sup> See, e.g., *In re Thomas*, 554 B.R. 512, 520 (Bankr. M.D. Ala. 2016) (mortgagee or mortgage servicer can violate the automatic stay for communicating with a debtor during bankruptcy even if those communications are for informational purposes).

bankruptcy case. The Courts have held these provisions to be fundamental and necessary for both the administration of the underlying bankruptcy case and the protections of the debtor after the bankruptcy discharge. More specifically, these provisions ensure that bankruptcy debtors receive the “fresh start” that the U.S. Bankruptcy Code is designed to provide.

The CFPB's final rule is contrary to this strong public policy of protecting bankruptcy debtors, will cause conflict within the administration of the bankruptcy case, and will unnecessarily subject servicers to serious liability under the Bankruptcy Code.

The CFPB's final rule attempts to address a mistakenly perceived notion that the Bankruptcy Code and Federal Rules of Bankruptcy Procedure fail to provide the consumer with an appropriate level of transparency into the status of a consumer's mortgage loan. Indeed, this issue was already comprehensively addressed by the Federal Bankruptcy Rules Committee, which promulgated certain rules in December of 2011. Those rules, which remain in effect today and are heavily enforced by the Executive Office of the United States Trustee, require servicers to notify Chapter 13 debtors, the debtor's attorney and the Trustee of any change in the consumer's monthly payment and any fee that has posted to the consumer account. These notices are then subject to objections by the debtor, the Trustee, and/or any other party in interest.

These notices have specific timing requirements and are sent to the relevant parties through a process governed by the bankruptcy rules. These rules were cautiously drafted by the Federal Bankruptcy Rules Committee to ensure transparency to the consumer, as well as the creditor's adherence to the requirements of the Bankruptcy Code, including the automatic stay. The CFPB rule is an overlay to existing bankruptcy rules that will only lead to customer confusion because the consumers will receive a stream of confusing and conflicting disclosures in different formats, through different mediums.

The CFPB's rule, in its current form, presents significant risk of diluting the Judiciary's efforts in effectively administering its bankruptcy cases and usurps the Judiciary's rule-making power in deciding what information should and should not be provided to a debtor during a bankruptcy proceeding. Our concerns focus on a series of forced communications and potential violations of the Bankruptcy Code that will lead to significant consumer confusion and servicer harm.

Finally, the CFPB's rule fails to address very serious issues that have been presented to the CFPB for over five years. Given the conflicts with the well-established rules that were cautiously drafted by the Federal Bankruptcy Rules Committee, we believe the CFPB's rule should be repealed. In the event the CFPB decides not to repeal its rule, we would respectfully ask the Bureau to address the following concerns:

1. Past Payment Breakdown: The CFPB rule requires that servicers provide a breakdown showing the application of payments received while the loan is in bankruptcy. Significant comments were received during the rulemaking stage indicating concerns with the presentation

of the information due to various accounts that mortgage servicers must maintain while the loan is in bankruptcy. The industry was pleased that the final rule did not adopt a post-petition application of payments approach. This eased the burden of automating bankruptcy ledgers for the production of periodic statements and allowed servicers to meet the April 2018 deadline for this particular aspect of the CFPB rule. *Unfortunately, we now understand that mortgage servicers will face legal action by trustees and possibly other parties if they follow the CFPB rule and represent the payments applied according to the contract. This is a significant new development that needs urgent attention by the CFPB. If the servicers will be challenged for following the CFPB rule, either the rule must be repealed or delayed significantly, or the rule must immediately remove the past breakdown requirement altogether.*

2. Servicer Transfers: Servicers that acquire active bankruptcy loans maintain robust reconciliation processes to ensure that the loan is properly boarded onto its system before it begins servicing the loan. These acquisition processes are an industry standard that is widely acknowledged and encouraged by the Courts, Trustees and regulators. These processes include, but are not limited to, a reconciliation of the mortgage payment history with court filings and the Bankruptcy Trustee's records (NDC), a review of filings under Bankruptcy Rule 3002.1 to determine both payment changes and outstanding fees and costs incurred since the bankruptcy filing, and treatment of the debt under the bankruptcy plan-. To be clear, servicers maintain these acquisition processes, not because the data being transmitted from Old Servicer to New Servicer is incorrect, but rather because the data transfer to the new system from the old system does not typically board fully without a manual review and reconciliation. In order to ensure that these acquisition reviews are adequately performed at the time of loan acquisition, it is highly recommended that the rule or commentary be updated to allow the servicer up to 90 days before sending its first statement. Without this clarification, servicers will be forced to send periodic statements in this scenario with potentially incomplete information that is in direct conflict with the filings in the bankruptcy proceeding.
3. Appropriateness of Using the Chapter 12 and Chapter 13 Statement Format in Chapter 11 Cases That Cure the Default and Maintain On-Going Payments: To the extent a Chapter 11 plan provides that it will cure a default and maintain on-going payments, are any issues foreseen with providing an analogous level of statement detail as will be provided on a similar Chapter 12 or 13 statement, taking into account the likely absence of a trustee in a Chapter 11 case?

4. Administratively closed Chapter 11 cases: We request clarification as to whether it is permissible to continue to send the Chapter 11 bankruptcy statement during the period where the case has been administratively closed but no final decree has been entered or no discharge order has been entered.
  
5. Pre-Confirmation Cases: Prior to plan confirmation in Chapter 12 and Chapter 13 cases, the servicer may not have accurate information about the post-petition payments. For example, the servicer may not have completed its Proof of Claim analysis or filed the Proof of Claim. The debtor and the mortgage servicer might disagree as to the amount of the ongoing post-petition payment as well as the post-petition due date. A servicer files its Proof of Claim according to its records and the debtor files his/her plan, which might include the amount of the post-petition payment and due date. In this scenario, the amount of the post-petition payment and corresponding due date are ultimately set forth within the confirmed plan. Until this time, however, a servicer could potentially be sending periodic statements with information that ultimately conflicts with the confirmed plan. In unofficial responses to the industry, the CFPB staff has indicated that servicers must estimate these amounts. This may not be possible due to the timing required to file a proof of claim (creditors have 70 days from the bankruptcy filing date) and the timing for producing the statement (monthly). Servicers should not have to add a step of estimating post-petition figures simply to produce the periodic statement. This can add significant work to the production of periodic statements, adds potential risk for the servicer, and very importantly, confuses the borrower. Additional flexibility in the presentation of post-petition information is urgently needed. We recommend that rule's correlated commentary be updated to allow the servicer to include in pre-confirmation cases either 1) the amount of the post-petition payment and corresponding due date is according to the records of the servicer at the time the periodic statement is sent, which may reflect the original obligation (contractual), estimates, projections or incomplete information, or 2) a statement that information, including "amount due" and "explanation of amount due" is "to be determined" or otherwise unavailable. Servicers should be allowed to leave the "amount due" and "explanation of amounts due" fields blank. As appropriate, the mortgage servicer should be permitted to indicate that amounts disclosed are subject to change in accordance with the confirmed bankruptcy plan.
  
6. Early Intervention Notice Exemption: 11 U.S.C. §524(j) provides that it is not a violation of the discharge injunction to communicate with a discharged debtor in the ordinary course of business in lieu of foreclosing on a lien on the debtor's principal residence. Any communication outside of this safe-harbor risks being found to be a

discharge injunction violation. “Principal residence” is not defined in the Bankruptcy Code but is generally interpreted as the place the debtor is living (as opposed to the debtor’s address identified on the petition for purpose of property designated at the time of originations). This bankruptcy code safe-harbor provision for communications covers Early Intervention notices, but only if the borrower remains in the property to establish principal residence status. For any other property, the early intervention notice requirements force mortgage servicers to potentially violate the bankruptcy discharge in sending notices on a non-principal residence property. Further, the CFPB adopted an exception for monthly statements when the borrower’s bankruptcy case filing reflects an intent to surrender the property. The surrender exemption, however, was not extended to Early Intervention notices.

7. Charge-Off Loans in Bankruptcy: Under the existing Periodic Statement Rules, servicers are required to send a final statement at the time of charge-off. While it is clear that this requirement will also apply to loans beginning in April 2018 that fall within the current Bankruptcy exemption, it does not appear that the CFPB rules or commentary explicitly allow a servicer to add disclaimers and/or adjust language so as to avoid an unintended violation of the automatic stay or discharge injunction. We request that the CFPB provide additional commentary that allows for such revisions and disclaimers to be included in the final charge-off statement. This would be consistent with the requirements and commentary applicable to the bankruptcy periodic statements that become effective in April 2018.
8. Chapter 13 Statements -- Pre-Petition Arrearage Information: The new rule requires that servicers segregate pre-petition amounts due and paid from post-petition amounts. This distinction is aimed at addressing the typical Chapter 13 scenario through which pre-petition arrearages are paid through the plan and disbursed from the trustee and the post-petition payments are made by the debtor. However, this distinction ignores the reality that the trustee may also be making other payments for post-petition items, such as properly noticed post-petition fees. Yet, servicers are unable to reflect these trustee-paid amounts, which will cause borrower confusion as the trustee ledger will not match the amounts reflected in the billing statement. This is yet another conflict that will need to get resolved.
9. Past-Petition Fees and Charges: Post-Petition fees and charges are subject to the notice provisions in Federal Bankruptcy Rule 3002.1. Creditors must provide a notice to the Trustee, debtor and debtor’s counsel within 180 days of a post-petition fee being incurred in order to collect the fee. The debtor or trustee has one-year from the notice to object to the fee. While the final rule provides flexibility in presenting

the fees on the statement when incurred or after meeting the 3002.1 obligations, the presentation of the fees has become an area of concern. It is unclear whether servicers will be challenged if they present fees on the statement when incurred (even though the billing statement is “for informational purposes and not an attempt collect a debt”). Waiting to place the fees on the statement is extremely complex and will require manual intervention to track information for up to 1½ years for the sole purpose of placing the information on the billing files. There is also a concern that failure to place fees on the billing statement, or in a timely manner, may be challenged as being waived despite a properly sent 3002.1 notice.

10. Successor in Interest Files for Bankruptcy. Since the rule defines a consumer as a “confirmed successor in interest,” there is confusion over whether the successor would receive a bankruptcy statement even if the borrower obligated on the debt was not in bankruptcy and, if so, how to present the information. A clarification is needed.

We thank you in advance for your attention to these time-sensitive issues and we welcome the opportunity to discuss these issues in greater detail with the CFPB.

Again, we respectfully request that the CFPB repeal this rule or, alternatively, delay the effective date so as to ensure these serious issues are properly addressed.

Sincerely,

American Financial Servicers Association  
Consumer Mortgage Coalition  
Credit Union National Association  
HOPE NOW Alliance  
Independent Community Bankers of America  
National Association of Federally-Insured Credit Unions  
Real Estate Settlement Providers Council