CENTER FOR CAPITAL MARKETS COMPETITIVENESS

Bill Hulse
VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5318
bhulse@uschamber.com

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Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

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Re: CFPB Rulemaking, Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X; 86 FR 18840

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("Bureau") regarding its proposed rule regarding protections for borrowers affected by the COVID-19 emergency under the Real Estate Settlement Procedures Act (RESPA).[1] We share the Bureau's goal of helping homeowners avoid foreclosure as the country emerges from the COVID-19 pandemic. We welcome the Bureau's engagement with stakeholders on this important topic and its openness to making further adjustments through the rulemaking process.

We agree that it is critically important to help homeowners avoid foreclosure. Forbearance and loss mitigation programs are extremely valuable tools. They enable many homeowners to cure delinquencies, continue to build wealth, and stay in their homes. Foreclosure is a tool of last resort: not only because of its obvious impact on the affected borrower, but also because it is a costly and time-consuming process for all parties. As a result, lenders and servicers have been working hard to help lessen the impact of the COVID-19 pandemic on American homeowners, including through effective forbearance programs. These efforts have seen significant success. Indeed, the Bureau, drawing on Black Knight market data, reports that forbearance programs have worked for over half of the American borrowers who entered them since the beginning of the pandemic.[2]While the economic impact of the pandemic remains enormous for countless families and communities, we are glad that these programs have been able to lessen the damage it has caused. We urge the Bureau

[1] *See* Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (REPSA), Regulation X, 86 Fed. Reg. 18840 (April 9, 2021).
[2] *Id.* at 18844 ("More than 50 percent of all borrowers who initiated a forbearance program, since the pandemic started, have begun to make their mortgage payments and are reperforming under the original terms of their agreement or have paid their mortgage off in full by either refinancing or selling their home.").

to build upon the success of these programs and stand ready to work with the Bureau to continue helping American homeowners stay in their homes.

We also recognize, however, that the mortgage market is both exceptionally complex and critical to our nation's overall financial health. Diverse stakeholders are governed by complicated regulatory frameworks and the marketplace is supported by countless contractual agreements, whether between servicers and sub-servicers, investors and servicers, or other market participants. Any regulatory action in the mortgage market consequently bears heightened risks of unintended consequences, both because of the complexity of the market and the potentially substantial impact of any regulatory misstep.

Regulatory changes that make it more difficult to service loans, for example, may end up raising the cost of credit across the market or reduce access to credit. Similarly, changes that artificially extend consumer delinquency could make it harder for a consumer to sell their home outside of foreclosure, or could unduly elevate their credit score, distorting future lending decisions by feeding inaccurate information into underwriting decisions, which will exacerbate the issue at hand. Likewise, delaying inevitable foreclosures can strip borrower equity and frustrate ongoing work by banks and community leaders to support neighborhood regeneration, leading instead to increased blight within low-income communities. Such delay also would restrict supply of affordable housing, an issue that has already become a crisis in many communities around the country and that hurts American families who otherwise would be able to advance along the path of wealth creation. As these and other examples reflect, it consequently is critical for any regulatory action in the mortgage market to be carefully considered and grounded in a strong factual and legal basis. To the extent that such changes are made on an urgent basis, it also is important that the Bureau plan to address any regulatory uncertainty or unintended consequences that arise, and ensure that it puts in place a well-considered plan to phase out these temporary programs.

We consequently write to emphasize three points:

- The Bureau should focus its proposal on COVID-19 related hardships and provide exemptions under appropriate circumstances.
- The Bureau should address any unforeseen implementation challenges and regulatory uncertainty that results from its rulemaking.
- The Bureau should consider how it will eventually phase out this program so as to avoid a "foreclosure cliff" or undue turmoil within the marketplace.

Analysis

1. The Bureau should focus its proposal on COVID-19 related hardships and provide exemptions under appropriate circumstances.

As the Bureau highlights in its proposal, it is important that any amendments to governing rules "facilitate efficient and timely pre-foreclosure loss mitigation review without interfering with the housing market in a way that is not proportional to the level of potential borrower harm."[3] Indeed, crafting a solution that builds on the success of existing loss-mitigation programs and is tightly tied to the identified problem is prudent given the unfamiliar territory the Bureau now is crossing. As the Bureau correctly notes, there is a "lack of historical precedent" for the number of "mortgage borrowers in forbearance of such long duration at once" or so "many mortgage borrowers . . . forecast to exit forbearance within a relatively short time frame."[4] And this lack of precedent "creates market uncertainty for the future."[5] Moreover, the Bureau acknowledges that it is "unaware of research that explicitly investigates the link between COVID-19 related stress and comprehension of information about forbearance and foreclosure."[6] In other words, not only is the current situation without precedent, but the Bureau's diagnosis and proposed cure also are based on its evaluation of the current situation, rather than directly relevant past experience. This uncertainty counsels for a careful regulatory approach that is tied closely to the problem that the Bureau seeks to address and that builds upon the success of existing programs. Such an approach will be the best way for the Bureau to avoid unintended consequences in the mortgage market, such as the creation of a foreclosure cliff, increases in the cost of capital, or reductions in access to credit or available affordable housing.

The Bureau should take two key steps to appropriately tailor any final rule to addressing the COVID-19 pandemic.

- The Bureau should ensure that each of the amendments made by a final rule addresses a COVID-19 related hardship experienced by the borrower. The Bureau should not make generally applicable changes to Regulation X since doing so would take any final rule beyond the Bureau's stated goal. Rather, to reduce the risk of unintended consequences, the Bureau should focus any regulatory changes so that they address the problem it has identified.

- The Bureau should provide appropriate exemptions from its proposed amendments when they would not achieve the Bureau's stated goals. Failure to create such exemptions would create a significant risk of unintended consequences from any final rule. Accordingly, we strongly support the Bureau's contemplated addition of exemptions to the "first legal" prohibition in cases in which (1) the borrower is not eligible for any non-foreclosure option, or (2) the servicer has tried to contact the borrower but the borrower has not responded to that outreach.[7] These exemptions could alternatively be structured by providing a phased-in approach in which the foreclosure process could be commenced prior to January 1, 2022 for certain borrowers who have not entered into a forbearance or loss mitigation process. However the Bureau structures such exemptions, we urge it to adopt a solution that recognizes that loss mitigation and forbearance options may have no practical value given the circumstances of a particular borrower.

[3] *Id.* at 18842.
[4] *Id.* at 18844.
[5] *Id.*
[6] *Id.* at 18848 n.78.
[7] *Id.* at 18864.

By tying the relief provided to the intended purpose of the regulatory amendments, the Bureau would achieve its policy goals, build upon the success of existing loss mitigation and forbearance processes, and help reduce the risk of unintended consequences. For example, it would reduce the risk of creating a foreclosure cliff as well as avoid compounding the shortage of affordable housing across the country.

We likewise would urge the Bureau to ensure that any final rule is firmly grounded in the Bureau's legal authority. We have heard concerns, in particular, that the Bureau's proposed prohibition against filing a "first legal" this year exceeds its statutory authority under RESPA or the Dodd-Frank Act. While we are continuing to evaluate the legal basis for the Proposal, we believe that the Bureau should be certain of the legal basis for any final rule, particularly before taking any action that would disrupt settled contracts, including between investors and servicers. Any approach that both requires servicers to violate pre-existing contractual obligations and lacks a clear legal basis is likely to be subject to litigation. That litigation could create enormous uncertainty around the implementation of any final rule, which would be particularly harmful for consumers given the short time frame under which the Bureau seeks to implement the proposed amendments. We consequently would urge the Bureau to tailor the final rule so that it is tightly focused on areas where the Bureau's legal authority is clear. We also would urge the Bureau to provide greater explanation of the basis of its legal authority than offered in the Proposal, with a particular focus on the legal authority for its "first legal" prohibition.

2. **The Bureau should address any unforeseen implementation challenges and regulatory uncertainty that results from its rulemaking.**

The Bureau is undertaking this rulemaking on an expedited basis. Accordingly, it is important to recognize that undertaking any rulemaking on an expedited basis increases the risk that any final rule will have unintended consequences. We urge the Bureau to acknowledge this risk and be prepared to take appropriate steps to address any issues that arise once any final rule is implemented.

In particular, we urge the Bureau to monitor implementation of any final rule closely to identify any areas of regulatory uncertainty or unintentional compliance challenges that arise. We are confident that servicers will work hard to ensure compliance with any final rule that the Bureau issues. Unanticipated fact patterns or unexpected circumstances inevitably arise, however. Given the short rulemaking process, we would urge the Bureau to expect these issues to arise and to work closely with servicers and lenders to address them. If necessary, for example, we would ask the Bureau to be prepared to make necessary adjustments to any final rule. We also would ask the Bureau to use its full regulatory tool kit to address any regulatory uncertainty that arises. For example, we would encourage the Bureau to use no-action letters or advisory opinions to the extent helpful to address questions that may arise in the implementation of any final rule.

We also would urge the Bureau to coordinate closely with other federal agencies that are active in this and related fields to ensure that any final rule is aligned—and remains aligned—with those agencies' approaches. As the Bureau notes, for example, the Centers for Disease Control and Prevention is playing a central role in establishing policy relating to foreclosures. It will be important for the Bureau to maintain close working relationships with all relevant agencies going forward to ensure that its approach works in concert with those of other agencies, rather than creates undue and counterproductive conflict.

3. The Bureau should consider how it will phase out this program so as to avoid a "foreclosure cliff" or undue turmoil within the marketplace.

The Proposal includes sunset dates for key elements of the proposed amendments: December 31, 2021 for the "first legal" prohibition and August 31, 2022 for the proposed amendments to the early intervention requirements. We welcome the inclusion of these sunset provisions and ask the Bureau to include them in any final rule. We also would ask the Bureau to consider appropriate sunset dates for other provisions within the Proposal that are not currently subject to a proposed sunset date.

We also recognize, however, that circumstances change and that there have been many examples of temporary regulatory amendments that have become long-term programs. We think that such an evolution would be a mistake here for at least two reasons. First, the COVID-19 pandemic will eventually be behind us, depriving the proposed amendments of a policy rationale. Second, long-term adoption of the amendments in the Proposal will distort the marketplace. It would artificially support borrowers, leading to greater financial consequences when the support is finally withdrawn and disrupting risk-based pricing, including by supporting artificially high credit scores for borrowers during the forbearance period. It also would lead to a foreclosure cliff when relief is no longer available. As a result, the Bureau should think carefully about its strategy to sunset these amendments. It should ensure that it has a plan to revert to current rules and anticipate and account for the types of pressures it may face to keep temporary rules in place. By working proactively now, the Bureau can ensure that it will wind down this program effectively, avoiding unintended consequences and ensuring its ultimate, long-term success.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

William R Hulse

Bill Hulse