



October 13, 2021

Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Need for Pre-Foreclosure Protections in 2022 Due to the Ongoing COVID-19
Pandemic

Dear Director Chopra:

Congratulations on your confirmation as Director of the Consumer Financial Protection Bureau. We are excited to work with you to improve protections for consumers.

We write to ask that the Consumer Financial Protection Bureau issue an Interim Final Rule extending certain key pre-foreclosure procedural safeguards into 2022. A significant number of homeowners are still in forbearance periods. As things currently stand, borrowers who exit forbearances in 2022 will have no automatic pre-foreclosure protections. Servicers will be permitted to initiate foreclosure immediately after the end of the forbearance unless a borrower submits a complete application packet, which few are doing during this crisis due to the shift to a streamlined modification framework and the relaxation of reasonable diligence practices.

The data show a strong need for ongoing protection

We will enter 2022 with a substantial number of homeowners still in forbearance or significantly delinquent but no longer in forbearance plans. These numbers are much greater than those the Bureau relied on in connection with its final rule.¹ Most critically, the spike in forbearance exits that Black Knight predicted continues to be delayed. According to the April 2021 report released on June 7, 2021, which the Bureau cited multiple times in connection with its final rule,² Black Knight predicted a peak of over 800,000 forbearance exits during June of 2021, with exits almost vanishing completely by December of 2021.³ Black's Knight's August 2, 2021, report changed the prediction significantly. It showed June 2021 exits of well under 100,000 and predicted a revised peak of exits in September of 2021 at around 700,000.⁴ The August report also predicted

¹ CFPB, Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X, 86 Fed. Reg. 34848, 34852 (June 30, 2021).

² See 86 Fed. Reg. 34848 at fn. 7-9, 40-43, 45-57. It is important to note that the report released on June 7, 2021 was labeled the April 2021 Black Knight report.

³ Black Knight Mortg. Monitor, April 2021 Report at 7 (June 7, 2021), https://cdn.blackknightinc.com/wp-content/uploads/2021/06/BKI_MM_Apr2021_Report.pdf.

⁴ Black Knight Mortg. Monitor, June 2021 Report at 10 (Aug. 2, 2021), https://cdn.blackknightinc.com/wp-content/uploads/2021/07/BKI_MM_June2021_Report.pdf.

that the large number of exits in the fall would mean that exits would taper off in the last months of the year, with few exits occurring in December of 2021.⁵

The most recent report, released on September 22, 2021, again showed another significant delay of the predicted surge in forbearance exits.⁶ This report further revised June's figures and revealed almost no exits in June of 2021, which only four months ago was predicted to be the peak of exits.⁷ Moreover, the report pushed the projected peak back another month from the report released in August, to October 2021. Crucially, it also predicted 200,000 borrowers exiting forbearance in December of 2021, and it began predicting exits into 2022.⁸

Based on the continuing delay of large-scale forbearance exits into 2022, the Bureau should recognize the need for continued protections. According to the Black Knight data, the market is in a substantially different situation than was predicted several months ago, with far more borrowers still in forbearance at this point in time than expected.

Moreover, a significant number of borrowers remain in seriously delinquent status. According to the most recent Black Knight report, over 1.3 million borrowers are more than 90 days behind on their mortgages.⁹ While that number has dropped significantly from the beginning of the year, the average number of borrowers exiting serious delinquency per month in 2021 stands at 107,266. Even if 125,000 borrowers exit seriously delinquent status each month until the end of the year, over 800,000 borrowers will still be seriously delinquent at the expiration of the Bureau's rule -- approximately twice the number at the start of the pandemic. Moreover, as we know from HUD's Neighborhood Watch data, around 700,000 seriously delinquent borrowers have FHA-insured loans, which are disproportionately held by the borrowers of color hit hardest by the pandemic. Accordingly, servicers are still likely to be handling a large volume of loss mitigation requests in 2022, and thus will need incentives to engage in loss mitigation rather than fast-track borrowers into foreclosure.

In addition to the still-looming large number of forbearance exits, Homeowner Assistance Fund (HAF) programs have seen significant delays. While a few states have very limited pilot programs running, the Treasury Department is still reviewing states' proposed HAF plans, and states cannot open their application portals until they receive approval from Treasury. As a result, borrowers will not even be able to apply for HAF assistance in most places before January at the earliest.

When the current RESPA procedural safeguards sunset on December 31, 2021, the data point to a significant surge in foreclosures. Foreclosure law firms are ramping up to prepare for this influx of cases. Some have speculated that the most delinquent borrowers (or those who exited

⁵ *Id.*

⁶ Black Knight Mortg. Monitor, August 2021 Report at 6 (Sept. 22, 2021), https://cdn.blackknightinc.com/wp-content/uploads/2021/10/BKI_MM_Aug2021_Report.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 20.

forbearances longest ago) will be put into the process first, but there is no guarantee of any kind of logical order to the foreclosure filings. A borrower whose forbearance ends December 31 could be in foreclosure by January. Servicers have been on notice for months that forbearance plans are expiring and may be eager to move quickly on initiating foreclosures.

All delinquent borrowers exiting a forbearance would benefit from a cushion of protection before the servicer is permitted to initiate foreclosure. Federally-backed borrowers have certain post-forbearance options that the servicer is required to evaluate and offer within a specific time period after the forbearance ends. For GSE loans, the servicer is required to offer a deferral within 15 days after the end of a forbearance, and if that is not accepted, offer a Flex Modification within 15 days of the expiration of the deferral offer. FHA, VA, and USDA do not require an affirmative offer to most borrowers,¹⁰ but do direct servicers to evaluate borrowers for the COVID-19 waterfall of options. Creating a mandatory post-forbearance cushion would dovetail with FHA and GSE rules requiring post-forbearance loss mitigation efforts.

However, investor rules also put a countervailing pressure on servicers to ensure that they initiate and complete foreclosures promptly. For example, FHA requires servicers to initiate the “first legal” action to foreclose within a certain timeframe. Servicers have raised the alarm recently that under FHA’s current guidance, they may be required to initiate foreclosure on a large number of FHA loans by the end of January 2022 (180 days after the expiration of the FHA moratorium). Creating a mandatory pre-foreclosure buffer at the end of a forbearance exit would help servicers to focus on offering federally-backed loss mitigation options, and would encourage compliance with the federally-backed loss mitigation frameworks, while also alleviating the pressure to rapidly initiate foreclosure. For non-federally backed mortgages, a protected time period after forbearance is even more important – to provide time for servicers to either offer a streamlined deferral or modification (if they have such an option available) or exercise reasonable diligence in order to collect and review a complete application.

Proposed solution: A 60-day cushion after the end of forbearance periods

We urge the Bureau to address the sudden drop-off of pre-foreclosure protections looming as of January 1, 2022. The Bureau should issue an Interim Final Rule extending a modified version of the procedural safeguards that are currently in effect. Specifically, the foreclosure protection purpose of the “unresponsive borrower” procedural safeguard could be extended by replacing it with a simpler safeguard that requires only one element: “the borrower’s forbearance program, if any, ended at least 60 days before the servicer makes the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process.”¹¹

¹⁰ The only FHA borrowers who will receive an unsolicited offer of permanent loss mitigation are the relatively small number who are eligible for the Advance Loan Modification. This has been estimated to be about 10-15% of FHA delinquent borrowers.

¹¹ All other elements of the currently existing procedural safeguards would remain unchanged. This includes the coverage of the protections, requiring that the loan became 120 days delinquent on or after March 1, 2020; the servicer is not a small servicer; and the statute of limitations is not an issue. This final coverage prong would have to

We understand that servicers have questions about how to comply with the part of the current “unresponsive borrower” provision that requires a showing of 90 days of no communication from the borrower. For this reason, many servicers have elected to simply wait until January 1 to initiate foreclosure for all borrowers that are covered by the procedural safeguards. Simply requiring that no forbearance period has ended in the past 60 days would be a bright line rule to apply going forward. This rule would dovetail well with the Fannie Mae, Freddie Mac, and FHA loss mitigation rules, which require servicers to evaluate borrowers for loan modification and deferral options within certain timeframes after the end of a forbearance.

Under the current framework for pandemic-era post-forbearance options, complete applications are not being pursued. Rather, servicers are required to offer borrowers streamlined options. Servicers need a period of time after the forbearance ends to try to get borrowers to respond to phone inquiries and written loss mitigation offers. Once a file is referred to the foreclosure law firm, additional costs and legal fees are incurred, and the process of finalizing a loan modification or deferral (or using HAF funds to cure the default) becomes more difficult and less likely to succeed.

A new grace period of 60 days would provide a limited window of time after the end of each forbearance to pursue these options before foreclosure is initiated. Borrowers whose forbearances end by November 1, 2021, would not receive any additional protections. Those who are still in forbearances after that date would. For example, if a forbearance ended November 15, the servicer would not be able to make the first notice or filing until after January 15. If the forbearance ends March 1, the servicer could initiate foreclosure after May 1. We also suggest continuing the procedural safeguard “off ramps” for vacant properties and complete loss mitigation applications, as separate and additional pathways for servicers to be permitted to initiate foreclosure under those circumstances.

We would greatly appreciate the opportunity to meet with you about our proposal and any other alternatives you see to address the significant number of borrowers who will remain in seriously delinquent status after the end of 2021.

Supervision and enforcement

In addition to this suggested regulatory change, the Bureau should make clear to servicers that they will be subject to supervisory and enforcement actions if they fail to comply with the pre-foreclosure safeguards and if they fail to engage in the reasonable diligence and early intervention efforts required by Regulation X. In particular, it is extremely important for the Bureau to closely examine how servicers are complying with the increased COVID-19 early intervention requirements near the end of a forbearance. Borrowers need accurate and timely information about their post-forbearance options. Strong enforcement of this rule will make it

be adjusted to state that the rule applies if the statute of limitations will not run before the sunset date of the modified rule. We are suggesting that date should be October 1, 2022.

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more likely that the maximum possible number of borrowers can obtain permanent assistance and avoid unnecessary foreclosure. Moreover, the Bureau should collect data throughout the first half of 2022 to determine whether the enhanced EI requirements are needed beyond October 1, 2022.

Strong enforcement of the RESPA servicing rules can act as a deterrent to servicing practices that don't align with investor or homeowner interests and contribute to unnecessary foreclosures. Robust supervisory activity is crucial to prevent foreclosures and preserve home equity, especially in the communities of color that have been hit hardest by the pandemic. We urge the Bureau to use all available tools to achieve the goals outlined in this letter.

Thank you for your attention to these extremely important issues. If you have any questions related to this letter, please contact Alys Cohen at acohen@nclc.org.

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform Education Fund
National Fair Housing Alliance
National Housing Law Project