



**National
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*Fighting Together
for Economic Justice*

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June 8, 2021

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Washington, DC 20552

Jerome Powell, Chair
Board of Governors of the Federal Reserve
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1850 K Street, NW
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Jelena McWilliams, Chair
Federal Deposit Insurance Corporation
3701 Fairfax Dr.
Arlington, VA 22203

Todd M. Harper, Chair
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Michael Hsu, Acting Comptroller
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Melanie Hall, Chair
Conference of State Bank Supervisors
1129 20th St NW
Washington, DC 20036

Re: Joint Statement on Supervisory and Enforcement Practices Regarding the
Mortgage Servicing Rules in Response to the COVID-19 Emergency and the
CARES Act

Dear Acting Director Uejio, Chairman Powell, Chair McWilliams, Chairman Harper, Acting
Comptroller Hsu, and Chair Hall:

We write to ask that you update the Joint Statement on Supervisory and Enforcement Practices
Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the
CARES Act, which was issued by your agencies on April 3, 2020.

Background

Since the issuance of this Joint Statement, the Consumer Financial Protection Bureau and other
federal agencies have allowed mortgage servicers to violate the mortgage servicing rules without
fear of supervisory or enforcement action. Although the decision to relax supervisory and
enforcement actions may have been justifiable in April 2020, mortgage servicers have now had
over a year to adjust to the challenges presented by the pandemic and to develop systems for

helping homeowners access forbearance and post-forbearance relief. In addition, for the reasons outlined below, it is now reasonable and extremely important to require mortgage servicers to comply with the servicing rules in order to prevent unnecessary foreclosures.

- In the coming months, changes are anticipated to make loan modifications more affordable for FHA borrowers as well as those with mortgages owned by Fannie Mae and Freddie Mac.
- States are expected to have their Homeowner Assistance Fund programs up and running by late summer or early fall. These programs will provide funds to reinstate mortgages, which is particularly important for borrowers with non-federally backed mortgages, for whom the post-forbearance options offered by servicers may be more limited.
- With every passing week the economic recovery is gaining steam; and in August and September, students are likely to be back in in-person school, enabling additional workers to return to work without childcare limitations.
- Servicers need time to fully staff up to handle the large volume of impending loss mitigation requests, and also need incentives to engage in loss mitigation rather than fast-tracking a borrower into foreclosure. HUD's Neighborhood Watch data reflect that from January to March 2021, the number of FHA loans in forbearance decreased by 100,000, while the number of seriously delinquent loans decreased by only 30,000.¹ Servicers are not processing loan modifications and deferrals at the rate that forbearances are ending.

The Bureau recently issued its Notice of Proposed Rulemaking (NPRM) under the Real Estate Settlement Procedures Act (RESPA), signaling the possibility of a new pre-foreclosure review period that may begin on the rule's effective date. However, the rule will not take effect until 30 days after the final rule is published in the Federal Register, possibly as late as August 31, 2021. Until that time, nothing prevents servicers from initiating foreclosure on homeowners whose forbearances have ended – even if those homeowners have not yet been evaluated for post-forbearance options. Some servicers of privately held mortgages have been extending forbearance periods only one month at a time. These servicers will easily be able to initiate foreclosures before the final RESPA rule's effective date. Some servicers may initiate foreclosures before the effective date so as to strategically avoid being subject to the new pre-foreclosure review period. The Bureau must address the incentive for early foreclosures created by its proposal by modifying the Joint Agency Statement and requiring that any servicer who initiates foreclosure before the rule's effective date must be able to demonstrate strict compliance with the early intervention and reasonable diligence requirements in the existing regulations.

The Joint Statement also does not address servicers' ability to make streamlined loan modification offers under the existing loss mitigation rule. The Bureau has proposed in the NPRM the creation of an additional anti-evasion exception in order to allow servicers to offer a streamlined loan modification without collecting a complete application and reviewing the

¹ Comments of NCLC, AFR, and NHLP to the Consumer Financial Protection Bureau on its Notice of Proposed Rulemaking under RESPA at 31 and Appx. C (May 10, 2021), available at https://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/RESPA_NPRM_Comments.pdf.

borrower for all available loss mitigation options. Again, this rule will not become effective until August 31, 2021, at the earliest. We are concerned that servicers will not offer streamlined options until that time out of fear of potential agency enforcement actions. The Joint Statement should be modified to provide that the agencies will not pursue supervisory or enforcement actions against servicers that offer streamlined loan modifications consistent with the criteria outlined in the NPRM.

On March 31, 2021, the Bureau issued a compliance bulletin highlighting its supervisory and enforcement priorities related to mortgage servicing. The Bureau warned mortgage servicers that they need to be prepared for the large number of borrowers they know will be exiting forbearance plans around the same time, and to have systems in place and appropriate staffing to deal with the volume of loss mitigation requests. However, this compliance bulletin explicitly states that the Bureau will pursue enforcement actions “consistent with the flexibilities announced in the April 3, 2020 joint statement.” Preserving the joint statement’s protections for servicers makes the recent compliance bulletin much less effective. The Bureau, in coordination with the other federal agencies, should modify the April 2020 joint statement to restore key supervisory and enforcement tools that will in turn incentivize servicers to properly handle applications for loss mitigation assistance, and to address gaps in coverage of the existing rules until the NPRM becomes effective.

Actions the agencies should take to enforce the loss mitigation rules

Require servicers to send (b)(2) notices

In the joint statement, the federal agencies notified servicers that they would not take supervisory or enforcement actions against servicers that fail to send the notice required by § 1024.41(b)(2) within five business days, provided the servicer sends it by the end of the forbearance period. This notice informs borrowers of what documents they need to submit in order to achieve a complete application and be evaluated for all available loss mitigation options. Achieving a complete application is the only way to obtain dual tracking protections as well as the right to be reviewed for all available loss mitigation options. Under the joint statement, servicers could send this notice on the last day of a forbearance, and could initiate a foreclosure the following day, so long as the borrower is 120 days delinquent. Borrowers would have no likely prospect of preventing the initiation of foreclosure while they were reviewed for post-forbearance options.

We are aware that the loss mitigation framework adapted in response to the pandemic is not designed to hinge around a “complete application,” and having the borrower attempt to send a complete application without a review for streamlined options is not, in most cases, the desired outcome. Yet borrowers need to be informed of their right to submit a complete application, and how to do so, before the forbearance period ends. Depending upon what the Bureau adopts as the pre-foreclosure review period in the NPRM and when it becomes effective, completing an application may be the only way for borrowers to obtain protection from foreclosure when they exit forbearance.

We recommend that the agencies modify the joint statement to provide that they will not take supervisory or enforcement actions against servicers that delay sending a (b)(2) notice to borrowers that are performing on an active forbearance plan, provided that the servicer sends the (b)(2) notice at least 30 days prior to the end of the forbearance. Or, if the servicer wishes to offer the borrower a streamlined loss mitigation option compliant with § 1024.41(c)(v) or with the new proposed anti-evasion exception outlined in the NPRM, then the servicer could delay sending the (b)(2) notice until after a borrower either rejects or fails to timely accept the streamlined option, provided that the servicer does not initiate foreclosure until after the reasonable deadline for the borrower to supply the information and documents requested in the (b)(2) notice.²

Require other loss mitigation notices required by 1024.41(b) through (d)

The agencies should modify the joint statement to make it clear that servicers will be subject to supervisory or enforcement actions if they fail to send all other notices required by Reg. X § 1024.41(b) through (d) in a timely manner. This includes notices informing borrowers that they have submitted a complete application, and evaluation notices identifying all options they are being offered and those they are being denied.

Require forbearance offer letters (initially and upon any extension)

Reg. X requires that when a forbearance plan is offered, the servicer must promptly (generally within 5 business days) send a written notice that complies with § 1024.41(c)(2)(iii), setting out the term of the forbearance and explaining that the forbearance was offered based on an incomplete application. It appears that the joint statement may have softened this requirement as well, by notifying servicers that the agencies did not intend to take supervisory or enforcement actions based on failures to send any of the loss mitigation-related notices required by § 1024.41(b) through (d) so long as servicers made a good faith effort to provide these notices within a “reasonable time.” Yet these short-term loss mitigation notices are extremely important for borrowers in forbearance.

The agencies should immediately modify the joint statement to subject servicers to supervisory and enforcement action if they fail to send notices consistent with § 1024.41(c)(2)(iii), and should clarify that if a forbearance period is renewed or extended, the servicer is required to send another such notice within 5 days of the renewal or extension.

Moreover, all letters related to short-term loss mitigation offers should notify borrowers if they may be able to obtain a permanent loss mitigation option (deferral or streamlined modification) without the submission of a complete application, and identify how and when a borrower may be reviewed for such options. For example, the letter should state if a borrower needs to make live contact with the servicer (and the phone number, if so), when a borrower would need to take certain steps in order to have an option in place prior to the end of the forbearance, and any deadline after which an option may not be available.

² This is similar to the additional dual tracking protection obtained from servicers in exchange for added flexibility in sending a (b)(2) notice after a servicing transfer. See 12 C.F.R. § 1024.41(k)(2)(ii).

Require Early Intervention efforts

Before the joint statement signaled a relaxation of enforcement of this rule, servicers were required to send the early intervention notice by the 45th day of delinquency. This letter informs the borrower that loss mitigation options may be available and provides information about how to contact a U.S. Department of Housing and Urban Development (HUD) certified housing counselor. The joint statement removed the threat of supervisory or enforcement actions against servicers that fail to send the early intervention notice required by § 1024.39(b), provided the servicer makes “good faith efforts” to provide the notice “within a reasonable time.” This extremely vague requirement would be difficult for the agencies to enforce in any meaningful way. The agencies should make clear that servicers will be subject to supervisory or enforcement actions if they fail to send the early intervention notice promptly and at the times required by § 1024.39(b). Similarly, the agencies should modify the joint statement to make clear that servicers will be subject to supervisory or enforcement actions if they fail to make good faith efforts to establish live contact by the 36th day of delinquency, or if the servicer is resuming compliance after the updated joint statement, at least 30 days before initiating foreclosure. The agencies should notify servicers that if they have failed to make early intervention efforts during the past year, the agencies will not take supervisory or enforcement action if such servicers make good faith efforts to establish live contact and communicate the substantive information about loss mitigation options available from the specific investor for the borrower’s loan, as described in the NPRM. Such servicers that have failed to comply with early intervention or reasonable diligence requirements over the past year should also be required to send a streamlined loan modification offer to the borrower prior to initiating foreclosure in order to avoid supervisory or enforcement risk.

Allow streamlined loan modification offers

The agencies should encourage servicers to offer streamlined loan modification offers prior to the effective date of the final RESPA rule. The agencies can do this by stating, in a modified joint statement, that they will not pursue supervisory or enforcement actions against servicers that offer streamlined loan modifications consistent with the criteria outlined in the NPRM. As the Bureau’s NPRM notes, streamlined loan modification offers can prevent unnecessary foreclosures by providing efficient access to affordable long-term payments. Moreover, streamlined modifications have increased in availability during the COVID-19 pandemic, and the agencies’ guidance should reflect this shift and support this key tool in foreclosure prevention.

Require annual escrow statements

The joint statement removed the threat of supervisory or enforcement actions for servicers that fail to send a timely annual escrow statement required by 12 CFR § 1024.17(i), provided that servicers made good faith efforts to provide these statements within a reasonable period of time. There was never any reason to relax this requirement, as servicers are not being required to conduct any higher volume of escrow reviews during the pandemic than they were previously. Moreover, these annual escrow analyses are even more important during this time, when borrowers may be offered a deferral of missed payments and may not realize that they have a substantial escrow shortage. The agencies should modify the joint statement to make clear that servicers face supervisory or enforcement actions if they fail to send timely annual escrow

statements when next due of if they fail to send an escrow analysis within 30 days of the issuance of the modified joint statement to any account for which it failed to send an analysis over the past year. This recommendation is in addition to the one below regarding a short year escrow analysis for borrowers being offered a deferral or loan modification.

Require servicers to provide accurate information regarding loss mitigation options

The federal agencies should ensure that servicers are following policies and procedures that are reasonably designed to provide accurate information about available loss mitigation options, as required by 12 C.F.R. § 1024.38. The agencies should clarify that this obligation to provide accurate information about loss mitigation options includes providing the following information:

- Notifying borrowers that other options may be available, simultaneously with any offer of a streamlined deferral or loan modification, so that a borrower understands that the existing offer is not the only foreclosure avoidance option available; and
- Running a short year escrow analysis before offering a deferral or loan modification, so as to inform the borrower if the mortgage payment will increase due to an escrow shortage (and options for dealing with any such shortage). A borrower (and servicer) cannot assess the suitability of a payment deferral or modification option without being informed of the new, post-forbearance installment payment amount. Failing to run an escrow analysis will result in an inaccurate statement to the borrower if a servicer represents that the borrower may simply “resume making your pre-forbearance payment,” but in fact the payment will increase due to an escrow shortage.

Conclusion

There are many reasons to incentivize mortgage servicers to properly handle loss mitigation requests at this point in the pandemic, especially between now and the fall of 2021. In addition to preventing efforts to fast-track foreclosure initiation before the effective date of the final RESPA rule, the Bureau and agencies should make clear to servicers that they will be subject to supervisory and enforcement actions if they fail to engage in reasonable diligence and early intervention efforts as required by Reg. X. This will make it more likely that the maximum possible number of borrowers can obtain assistance and avoid an unnecessary foreclosure.

Strong enforcement of the RESPA servicing rules can act as a deterrent to the slipshod servicing practices that contribute to unnecessary foreclosures. The agencies’ actions in this area are 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 agencies to use all tools that are available and expedient, to achieve the goals outlined in this letter quickly in light of the urgency of this situation.

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.

Letter to Agency Directors re Joint Statement

June 8, 2021

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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