STRUCTURED FINANCE ASSOCIATION

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

Re: Docket No. CFPB-2021-0006; RIN 3170-AB07; Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X

Dear Acting Director Uejio:

The Structured Finance Association ("SFA") thanks the Consumer Financial Protection Bureau ("Bureau") for the opportunity to provide feedback on the Proposed Rulemaking Protections for Borrowers Affected by the COVID-19 Emergency (the "Proposed Rule").

As an association representing participants across the entire value chain of the securitization market—including lenders, bond issuers, investors, financial intermediaries, credit rating agencies, law firms, accounting firms, technology firms, servicers, and trustees—SFA plays a vital role in the development of consensus solutions that support efficient and stable markets.[1] Importantly, SFA mortgage investors who provide the capital that facilitates mortgage lending act as fiduciaries when making investment decisions on behalf of their customers--401(k) plans, pension plans, and individual savers. While our members often have conflicting views and conflicting interests, our governance structure requires consensus from all stakeholder groups before taking an advocacy position on legislative or regulatory matters. As such, when we do provide feedback, we do so in a manner that reflects the view of the entire market ecosystem.

Our members across the mortgage market value chain have remained committed to assisting American homeowners, including the extraordinary number of homeowners that have been impacted by the COVID-19 global pandemic. SFA supports market, legislative, and regulatory efforts aimed at ensuring that servicers and homeowners work together to evaluate all foreclosure-avoidance options available to them in a timely manner. Collaborative actions that streamline, improve, or provide certainty to the market and to borrowers are beneficial for homeowners, servicers and mortgage investors alike.

[1] SFA is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFA provides an inclusive network for securitization professionals to collaborate and, as industry leaders, to drive necessary changes, to be advocates for the securitization community, to share best practices and innovative ideas, and to educate industry members through conferences and other programs. Further information can be found at www.structuredfinance.org.

We always value the ability to work together to solve problems as they arise, and we particularly appreciate the steps the Bureau has taken in recent weeks to help market participants understand the intent of the Proposed Rule.

After careful review, we believe that the Proposed Rule offers some helpful things. Specifically, we support the Bureau's proposal to give servicers the ability to provide modifications with an incomplete application package. Especially given the exigencies of the pandemic, it is helpful for servicers to be able extend an effective and responsible loan modification option without concern about whether an individual answer or item is missing from a borrower application. That said, as we will discuss below, if this were to become a requirement to offer a modification with an incomplete borrower application package in all circumstances, this could materially impact important aspects of the loss mitigation process that ensures a modification is appropriately designed and consistent with the homeowner's ability to pay.

The rule also requires an additional review period before foreclosure processes can begin. SFA believes it is important for each borrower to be evaluated for loss mitigation. We are aware that in some rare instances, the Bureau has identified some servicers operating outside legal requirements. In these cases, it is of course appropriate for the CFPB to exercise their enforcement authority. But mandating a blanket, nationwide moratorium to manage servicer capacity is not the best tool to achieve the objective of preventing avoidable foreclosures. Importantly, such a proposal, no matter how well intended, runs outside the bounds of existing Bureau authority.

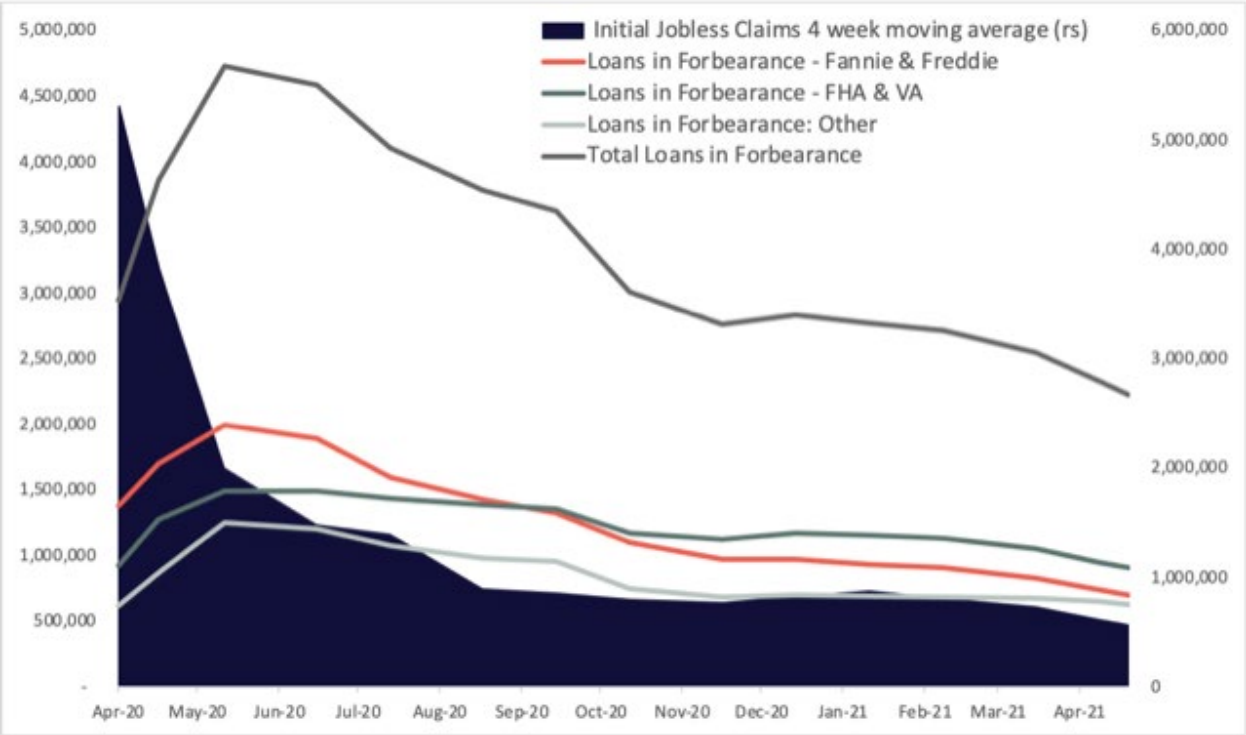
We thank the Bureau much for its consideration of our feedback, and we look forward to discussing the points outlined below at any time.

Background: Market Participants Are Providing Unprecedented Assistance to Homeowners

Since the National Declaration of Emergency Related to COVID-19, the vast majority of participants in the mortgage market have taken proactive steps, independent of legislation or regulation, in identifying borrowers impacted by COVID-19 and helping in accordance with the options available to them.

In these efforts, homeowners and the mortgage market overall have benefitted and continue to benefit from reforms put into place since the 2008 financial crisis. As a result of changes in law and structural market evolution, servicers today are better equipped to provide temporary payment relief options to keep borrowers in their homes when they experience a temporary payment disruption. Also, unlike the immediate aftermath of the 2008 financial crisis, servicers today are more adequately resourced and staffed, with greatly enhanced controls and procedures. With these tools in hand, servicers and mortgage investors are committed to finding the best overall economic outcome for all parties.

The pandemic presented an immediate shock to American lives and businesses, and both government and private lenders have proactively supported Americans adversely affected. In the mortgage market, servicers and mortgage owners quickly took action in the form of servicer outreach followed by payment relief programs such as forbearance and deferral periods to support those homeowners experiencing pandemic related hardship. According to recent data from Black Knight, mortgages in forbearance plans peaked in June 2020 in line with the increase in unemployment across the country, with approximately 3.48M Federally-backed mortgages (owned or guaranteed by FHFA, FHA or VA) in forbearance, and 1.24M private loans (bank balance sheet, private label security, or whole loan) in forbearance.



[2] Source: Black Knight Weekly Forbearance Report, Department of Labor

Note that, on an absolute basis, the higher number of forbearances granted to Federally-backed mortgages corresponds to the higher number of Federally-backed mortgages outstanding. On a relative basis—and throughout the COVID-19 pandemic—the percentage of privately-backed mortgages receiving forbearance has slightly outpaced the percentage of Federally-backed mortgages receiving forbearance. For instance, in May 2020, 9% of all loans were in forbearance, including 9.5% of all privately-backed loans[3]. As of April 2021, 4.4% of all loans were in forbearance, including 4.8% of privately-backed loans. Moreover, the decline in

[2] https://www.blackknightinc.com/blog-posts/another-week-of-forbearance-improvement-4-4-of-homeowners-remain-in-pandemic-related-plans/

[3] https://www.blackknightinc.com/blog-posts/mortgage-forbearance-volumes-flatten-total-roughly-steady-at-4-76-million/

forbearances has tracked closely between private and Federally backed mortgages. As of April 2021, the number of Federally-backed loans in forbearance has declined by 52% from the peak, down to 1.69M, and the number of borrowers with private payment relief plans has declined by 51% from the peak, down to 618,000[4].

Overall, these declines in forbearance correlate with unemployment numbers, which have similarly decreased over the past 13 months. These unemployment and forbearance declines are largely the result of aggressive fiscal and monetary policy actions. The forbearance declines are also the result of enhanced servicer capacity built over the past decade, as many servicers today have invested in technological updates that, alongside improved structural changes, make it easier for homeowners to request and obtain assistance.

The rate at which borrowers have been able to exit forbearance is essentially the same for both private borrowers and borrowers in Federally-backed mortgages. Data from the Mortgage Bankers Association provides additional clarity on how borrowers exited forbearance. Of the cumulative forbearance exits for the period from June 1, 2020, through March 21, 2021:

a) 26.9% represented borrowers who continued to make their monthly payments during their forbearance period.

b) 26.5% resulted in a loan deferral/partial claim.

c) 14.8% resulted in reinstatements, in which past-due amounts are paid back when exiting forbearance.

d) 14.1% represented borrowers who did not make all of their monthly payments and exited forbearance without a loss mitigation plan in place yet.

e) 8.3% resulted in a loan modification or trial loan modification.

f) 7.6% resulted in loans paid off through either a refinance or by selling the home.

g) 1.8% resulted in repayment plan, short sale, deed-in-lieu or other reason.

Our understanding is that the 14.1% of borrowers who exited forbearance without a loss mitigation plan in place is of particular focus for policymakers. According to Black Knight, this percentage includes borrowers who had been seriously delinquent prior to COVID-19 and started the foreclosure process.

Seriously Delinquent Mortgages (Non FC) - Not in Active Loss Mitigation and/or Forbearance Plans: Breakdown by Investor / Product

Investor/Product	Post-COVID-19 SDQs	Pre-COVID-19 SDQs	All SDQs

[4] https://www.blackknightinc.com/blog-posts/another-week-of-forbearance-improvement-4-4-of-homeowners-remain-in-pandemic-related-plans/

GSE	7,230	11,540	18,770
Porfolio	4,910	11,890	16,800
Private	6,550	29,600	36,150
FHA	6,430	22,900	29,330
GNMA - Other/Unknown	590	1,320	1,910
VA	2,810	5,890	8,700
Total (Borrowers Exiting without Loss Mitigation in Place)	**28,520**	**83,170**	**111,680**
% of Loans that Exited Forbearance	3.6%	10.5%	14.1%
Total Outstanding Loans*	53.1M	53.1M	53.1M
% of Total Outstanding Loans	0.053%	0.156%	0.21%

Source: Black Knight. Note: SDQs stands for seriously delinquent loan.
*Figures are based on observations from McDash dataset, and are extrapolated to estimate full mortgage market

Of the 111,680 borrowers who exited without a forbearance plan in place, 83,170 (or 74%) did so because they were already seriously delinquent at the outset of COVID-19. At 0.156% of all outstanding loans, this figure is consistent with the low level of borrowers who were seriously delinquent at the beginning of the pandemic.

Our understanding is that the remaining 28,520 borrowers—representing 3.6% of the cumulative loans that have exited forbearance between June 2020 and March 2021—is largely comprised of borrowers who have exited forbearance, but have not yet responded to servicer outreach. In this context, it appears the number of borrowers in this category does not indicate that borrowers are exiting forbearance without servicers reaching out to discuss loss mitigation options due to servicer constraints.

Cumulatively, the data suggest that post-crisis servicing reforms[5] coupled with unprecedented fiscal actions are positively impacting borrowers across the entire market.

The Streamlined Modification Proposal Could Help, Although Some Risks Do Exist.

Section 1024.41(c)(2)(vi) of the Proposed Rule allows servicers to offer streamlined modifications and proceed with that modification option even when there is an incomplete borrower response package. We believe that such an approach could have benefits, so long as the final rule does not impose a requirement on servicers to provide specific streamlined modification terms, especially if it were to run afoul of the governing framework in existing contractual documents.

[5] Notably, the benefits of these actions at the servicer level are demonstrated in the homeowner responses to the Bureau. While consumer complaints to the Bureau overall were up 54% year-over-year since the onset of the pandemic, homeowner complaints against servicers were actually down by 3.5%.

Transaction parties in today's market have incorporated many improvements to the servicing waterfall and loss mitigation options. In many instances, these deals include loss mitigation procedures similar to those in the Home Affordable Modification Program (HAMP), with options like term extensions, rate reductions, and targeted affordable payment amounts being built into the private mortgage market. However, that large-scale government mandated processes typically come with significant documentation and operational requirements that can lead to cumbersome, ineffective outcomes.

For that reason, today's loss mitigation terms do not mirror HAMP exactly, and we believe that in many cases this allows for more efficient processes and positive outcomes for homeowners. These processes are clearly outlined in contractual documentation. The final rule should not infringe upon up these existing contracts. In many instances, mandating specific modification terms after-the-fact would be to impose differing terms than those agreed to by transaction parties without offering tangible help to struggling homeowners. As we will discuss later, it also puts at risk this market's ability to provide reliable credit to all communities.

Under the current anti-evasion clause in Reg X regulations, servicers may only offer a modification if there is a complete borrower response package. The Proposed Rule would remove regulatory impediments for servicers to proceed with a streamlined modification even if there is an incomplete borrower response package. Servicing guidelines typically do not contemplate how a servicer may proceed with a modification when doing so would violate existing anti-evasion clause. As the Proposed Rule would expand instances where servicers may offer a modification, more homeowners may be eligible for a modification. This could be a positive outcome for struggling homeowners.

However, servicers must still be allowed to exercise discretion on what constitutes a minimally sufficient borrower response package for a homeowner to receive a streamlined modification. In some instances, a streamlined modification may be an appropriate option when there is an incomplete response package. In other instances, however, the incompleteness of a borrower response package after repeated inquiries from the servicer can serve as a metric to identify borrower engagement or desire for a loan modification. So long as servicers remain squarely within all regulatory requirements, this is a reasonable tool to use in loss mitigation decisioning.

For these reasons, we support the proposed flexibility offered by amending current anti-evasion provision of existing regulations. This, however, is only if servicers may exercise appropriate discretion based on the individual circumstances of each borrower. Most importantly, the Final Rule should not impose extra-contractual obligations or mandate that servicers provide streamlined loss mitigation options to all borrowers regardless of circumstance.

Additional Review Period May Not Provide Additional Benefits; Has Meaningful Drawbacks

Sections 1024.41(f)(1) and 1024.41(f)(3) would add a mandatory review period during which time no foreclosures could be initiated. It is not clear that extending foreclosures by mandating a blanket review period would benefit homeowners. Extending the foreclosure timeline does not

provide additional assistance options for homeowners, some of whom will have been in forbearance or deferral for over a year and a half. In fact, recent studies suggest that prolonging foreclosure timelines increases costs and reduces the equity in the home. In a paper published in September 2020 by the Federal Reserve Bank of Philadelphia, the authors examined the effects of various policies and rules intended to protect borrowers, writing:

> The new servicing rules associated with these programs were intended to enable more borrowers who are experiencing repayment difficulties to remain in their homes through increased loan modifications… We provide causal evidence that ***these rules have lengthened foreclosure timelines and elevated foreclosure costs***[6]**.** [emphasis added]

To this point, a recent study from the Urban Institute notes:

> Delaying foreclosures would not only prolong uncertainty, but would also prevent these properties from being sold to new buyers, who are chasing diminishing supply. Foreclosure filing notices can also sometimes motivate unresponsive borrowers to negotiate alternatives with their servicer. **Delaying foreclosures would delay alternatives, too**[7] [emphasis added].

American homeowners currently have a record level of equity in their homes, having benefitted from a 10.8% year-over-year home price appreciation[8]. Record-low interest rates have allowed many homeowners who were in forbearance plans to refinance into a lower monthly payment. For many homeowners rapidly increasing home prices, driven in the last year by the monetary and fiscal response to the pandemic, provides an important financial buffer, and for some homeowners an attractive opportunity to manage their household finances by selling their home and retaining the equity. The Urban Institute study further notes:

> With strong appreciation, most borrowers have substantial home equity, which has increased during the pandemic. As such, most uncurable loans, whether agency or non-agency, will be resolved via a market sale. Very few loans, where borrower is unreachable or the property vacant would take the foreclosure route. **This would render the proposed prohibition largely redundant—and counterproductive**—as properties would be held back from the market at a time when supply is tight [emphasis added].[9]

Obviously, many homeowners do want to remain in their home if they do have equity, and for these customers our members are committed to working with them to evaluate all reasonable options that are available. But a blanket delay could very well simply drag these resolutions out needlessly. In some cases where borrowers are unlikely to be able to resume payments on their mortgage, they may prefer to look at loss mitigation options that help them to sell their home.

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[6] *Mortgage Loss Severities: What Keeps Them So High?* Xudong An and Larry Cordell, Federal Reserve Bank of Philadelphia. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699649

[7] https://www.urban.org/urban-wire/cfpbs-proposed-foreclosure-prohibition-unnecessary-and-would-prolong-property-resolution

[9] Id.

[9] Id.

For these borrowers, additional time on top of the 18+ months already afforded equates to simply "kicking the can down the road"—often times to the borrower's detriment.

In addition, we would raise the following concerns with the current proposal:

a. The Bureau Lacks the Legal Authority to Halt Foreclosure Proceedings

As outlined above, we believe that the Bureau has numerous options for supporting borrowers, servicers and the mortgage owners through the current crisis, without resorting to the blanket foreclosure moratorium currently proposed. Finding properly tailored solutions that reflect both the macroeconomics and market dynamics of today is a much better approach.

That said, there is no provision in RESPA that provides the Bureau the legal authority to impose a nationwide moratorium on foreclosures. We outline the basis for our view on this matter below, and we raise the point because we have concerns about the precedent that it would establish.

It is a fundamental principle of constitutional law that no executive "agency may . . . confer power upon itself."[10] The Administrative Procedure Act recognizes that rule, and directs courts to "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory . . . authority[.]"[11] Thus, "[a]n agency may not promulgate *even reasonable* regulations that claim a force of law without delegated authority from Congress."[12]

Congress's statutory delegation of authority to an agency can be express or implied.[13] Even statutes that broadly grant general rulemaking authority to agencies "do not supply an agency '[c]arte blanche authority' to promulgate rules on any matter relating to its enabling statute."[14]

Taking a recent and highly relevant example, this week the federal district court in the District of Columbia struck down the Center for Disease Control's eviction moratorium, finding that the agency's broad statutory authority to "make and enforce such regulations as . . . are necessary to

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[10] *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986).

[11] 5 U.S.C. § 706(2).

[12] *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796, 801 (D.C. Cir. 2002) (emphasis added).

[13] To determine whether "Congress has explicitly or impliedly left a gap for an agency to fill," reviewing courts use the two-step framework known as the *Chevron* analysis. *Michigan v. E.P.A.*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). Under *Chevron*, courts first consider whether "Congress has directly spoken to the precise question at issue," and second, if Congress has not spoken to the precise question at issue, "whether the agency's answer is based on a permissible construction of the statute." *Chevron. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

[14] *Merck & Co. v. United States Dep't of Health & Hum. Servs.*, 385 F. Supp. 3d 81, 92 (D.D.C. 2019), *aff'd,* 962 F.3d 531 (D.C. Cir. 2020) (quoting *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979)). In *Merck*, a federal court held in 2019 that a statute authorizing the Department of Health and Human Services to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter" did not authorize HHS to promulgate a rule compelling pharmaceutical companies to disclose the wholesale price of a marketed drug. *Id.* at 90–91. Similarly, in *American Bar Association vs. the Federal Trade Commission,* the D.C. Circuit held that the Federal Trade Commission lacked statutory authority to regulate law firms under its statutory authority to regulate financial institutions. 430 F.3d 457, 469 (D.C. Cir. 2005).

prevent the . . . spread of communicable diseases" did not include the authority to impose an eviction moratorium.[15]

The Bureau invokes three provisions of the Real Estate Settlement Procedures Act (RESPA) for its authority to promulgate the foreclosure moratorium: (i) Section 19(a)'s general grant of rulemaking authority to the Bureau "to achieve the purposes of [RESPA]"; (ii) Section 6(j)(3)'s authorization for the Bureau to "establish any requirements necessary to carry out [Section 6]; and (iii) Section 6(k)(1)(E)'s prohibition that servicers of federally related mortgage loans shall not "fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter."

Clearly, none of these provisions expressly provide the Bureau authority to prohibit foreclosures. But we also question whether any such authority properly can be implied from these provisions, given the statutory text, context, and traditional role of the states in regulating foreclosure.

First, RESPA's statement of congressional purpose does not speak to servicing at all.[16] And the subjects on which Congress regulates servicers under Section 6 are limited. They include mortgage servicing transfers, qualified written requests, escrow accounts, ensuring timely responses to borrower requests to correct certain errors, requiring the identification of the mortgage owner, and force-placed insurance.[17] Indeed, Section 6 mentions "foreclosure" just once—Section 6(k)(1)(C) prohibits servicers from "fail[ing] to take *timely action to respond to a borrower's requests to correct errors relating to* allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer duties."[18]

Second, there is nothing from the context of RESPA's enactment to suggest that Congress delegated authority to the Bureau to prohibit foreclosures. To the contrary, Congress added Section 6(k) to RESPA as part of the Mortgage Reform and Anti-Predatory Lending Act, also known as Title XIV of the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act).[19] The Dodd Frank Act sprung directly from the nation's devastating 2008-2009 foreclosure crisis and represents Congress's most comprehensive effort at financial reform in a generation. Thus while numerous provisions of Title XIV speak directly to foreclosure,[20] it is

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[15] *Alabama Ass'n of Realtors v. U.S. Dep't of Health and Human Srvs.*, Case No. 1:20-cv-03377-DLF (D.D.C. May 5, 2021) (slip op. at *12). *See also Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, No. 2:20-cv-2692, 2021 WL 1171887, at *4 (W.D. Tenn. Mar. 15, 2021) (concluding that the CDC Order exceeded the statutory authority of the Public Health Service Act); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720, at *12 (N.D. Ohio Mar. 10, 2021) (holding that the CDC exceeded its authority under 42 U.S.C. § 264(a)).

[16] *See* 12 U.S.C. 2601(b) (listing purposes of RESPA as (1) "more effective advance disclosure to home buyers"; (2) "the elimination of kickbacks or referral fees"; (3) reductions "in the amounts home buyers are required to place in escrow"; and (4) "reform and modernization of local recordkeeping of land title information.").

[17] *See* 12 U.S.C. 2605 *et seq*.

[18] 12 U.S.C. 2605(k)(1)(C).

[19] *See* Pub. L. 111-2013 (July 21, 2010).

[20] *See id.* at §§ 1413 (establishing statutory defenses to foreclosure actions); 1447 (establishing default and foreclosure database); 1452 (appropriating money to inform delinquent borrowers about foreclosure rescue scams); 1484 (amending the Protecting Tenants at Foreclosure Act); 1494 (authority study on effect of imported drywall from China on residential loan foreclosures).

notable that Section 6 does so only in a specific and limited context—responding in a timely manner to borrower requests to correct errors. We "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[21] Indeed, that has been true during the COVID-19 pandemic, where Congress has explicitly imposed a moratorium on foreclosures by "servicer[s] of a Federally backed mortgage loan" for a statutorily-defined period of time.[22]

Third, foreclosure generally is the province of state law. "Federal law may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion."[23] Indeed, states have long developed their own procedural and substantive safeguards for foreclosures occurring within their borders, which reflect the unique needs and policy priorities of each state. When Congress intends to disrupt the traditional balance between state and federal regulation of a critical economic activity, we expect it to take that step expressly and unambiguously.[24] As the Supreme Court frequently reiterates, Congress "does not . . . hide elephants in mouseholes."[25] For this reason too, we seriously question that Congress intended, through RESPA, to authorize the Bureau "to be able to speak with the force of law"[26] to prohibit *all* foreclosures *nationwide*—particularly where the foreclosure action is permitted by contract, allowed under state law, and, assuming all loss mitigation requirements under Regulation X have been satisfied, appropriate under the circumstances for both the borrower and the mortgage owner.

Congress undertook meaningful action in passing mandatory foreclosure moratorium in 2020. But that moratorium had a sunset period, and that period is approaching. If Congress were to wish for an additional extension, we would offer the same feedback we have provided here as it relates to blanket moratoriums. But such an action would have the benefit of making clear Congressional intent.

b. Many Loans Very Clearly Fall Outside the Intent of the Proposed Rule

As outlined above, we do not understand which population of loans would benefit from an additional, mandated review period, given that loss mitigation mechanisms are already in progress. That said, many loans should clearly fall well outside the reasonable objectives of the proposed mandatory review period. Examples of the kinds of exemptions that should, at a minimum, exist to any final rule would include instances such as the following:

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[21] *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (internal citation and quotation marks omitted).

[22] 15 U.S.C. 9056(c)(2) ("Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60-day period beginning on March 18, 2020.").

[23] *Am. Bar Ass'n v. F.T.C.*, 430 F.3d at 471.

[24] *See id.* at 472 ("Otherwise put, 'if Congress intends to alter the usual constitutional balance between the States and Federal government, it must make its intention to do so unmistakably clear in the language of the statute.'") (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (cleaned up).

[25] *Whitman v. Am. Trucking Ass'ns.,* 531 U.S. 457, 468, (2001).

[26] *Merck*, 385 F. Supp. 3d at 89 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

a) The borrower is severely delinquent (i.e., 120+ days) and has been unresponsive to multiple servicer inquiries.

- Servicers would be required to document outreach efforts and attempts, in compliance with relevant state and Federal requirements.

- If the borrower has been unresponsive to servicer inquiries, foreclosure notification may trigger a customer to contact their servicer and seek assistance where prior to outreach efforts were not successful. Delaying referrals and sales for unengaged customers will increase the risk of property degradation and reducing the homeowner's equity.

b) The property is vacant or abandoned.

- Subjecting vacant and abandoned properties to a mandatory review period would prevent such properties from changing hands and contribute to neighborhood blight.

- Bureau should clarify the definition of vacant or abandoned by deferring to state law where the property is located and/or utilizing the Uniform Law Commission definition of a vacant/abandoned property.[27]

c) The borrower is severely delinquent (i.e., 120+ days) and has been reviewed for all available options under the terms of the transaction document and found ineligible or declines all of them.

- Servicers would need to document outreach efforts and details of communications with borrowers where available options were presented. There would also need to be a finding of ineligibility.

- This exemption would include borrowers who were in the foreclosure process prior to COVID-19, and who have not had a change in circumstance.

In enumerating and adopting exemptions to the foreclosure review period, we recommend that the Bureau continue to work with the industry after the finalization of the rule but prior to implementation to ensure compliance is well-understood. The adoption of such exemptions would provide clear guardrails for the industry around RESPA authority limitations, would facilitate a functioning market, and would ultimately benefit borrowers and consumers.

c. Identifying Specific Issues to Address and Resolve

As noted above, the question of CFPB's authority to enact the foreclosure review period is unclear, and the harm from negative unintended consequences could outweigh any benefit. However, to the degree that there are specific practices or behaviors that are of particular concern

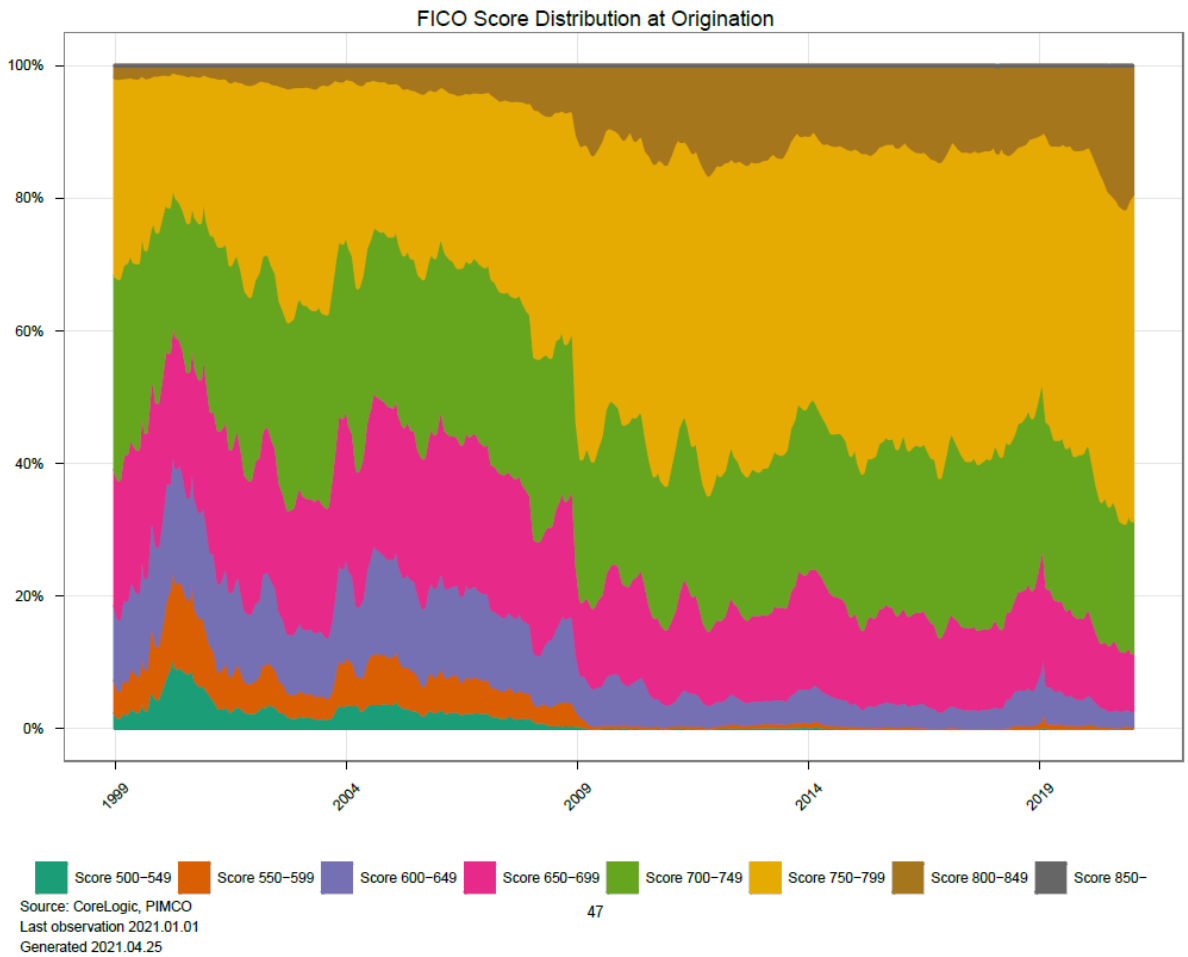
[27] https://www.uniformlaws.org/committees/community-home?CommunityKey=1b1a9c21-087f-4f09-a956-8a12258b969e

to the CFPB, we welcome the opportunity to collaborate on these issues. SFA understands that private capital can benefit borrowers, but only when clearly-articulated rules of the road are understood, followed, and enforced. Rather than the blunt tool that effectively amounts to a blanket moratorium, homeowners would be better served by CFPB identifying and articulating specific practices or behaviors that should be addressed.

Conclusions: Long-Term Unintended Consequences Require Consideration

It is important to evaluate the Proposed Rule and its impact on existing contracts. This is particularly true as it relates to the proposed mandatory review period before servicers may initiate a foreclosure regardless of borrower circumstance and regardless of the actions that the borrower and servicer have already taken

We ask the CFPB to consider carefully how its regulatory actions impact the market's ability to serve all American communities. Negative unintended consequences of regulation or of establishing a precedent that the Bureau will operate outside its legal authority may exacerbate trends towards reducing the availability of mortgage lending, particularly for borrowers with less-than-perfect credit. Of concern to us is that this trend has dominated private mortgage origination for much of the past decade. As demonstrated in the chart below, the percentage of loans going to borrowers with pristine credit (FICO 750+ at the time of origination) now stands at 70%.



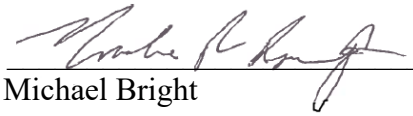
The private-label securitization ("PLS") market is capable of providing safe and responsible access to credit across all communities but has faced many policy headwinds in recent years. For example, while the policy response to COVID-19 was wide ranging (including the Federal Reserve and Treasury Department providing liquidity support for money market mutual funds, primary dealers, asset-backed securities, states and municipalities, a program for mid-size businesses and nonprofits, and more), these programs did not include any liquidity support for mortgage servicers or non-Agency RMBS[28]. For right or wrong, the perception now exists that in future economic downturns, private capital in RMBS markets will be largely without any form of support relative to the support that other markets receive. This decision directly impacted the PLS market's ability to serve households that fall outside of the normal credit box.

While this is not directly related to actions taken or prosed by the Bureau, we do hope the CFPB understands the environment in which this market is attempting to operate. We hope that over the coming years, our industry can work with the CFPB to find ways to leverage the capital and expertise of PLS market participants to serve all communities safely and responsibly, especially

those communities who find themselves marginalized and left behind all too often. The market's role in providing mortgage credit on terms that work for all American borrowers is critical. As is the Bureau's role in ensuring a safe and sound borrowing environment for all American consumers. Our members and our markets share the goals of the Bureau in protecting American consumers. We look forward to working closely with the CFPB on this and the many other important challenges that impact borrowers in all assets across all communities across our country.

SFA appreciates the opportunity to provide the foregoing comments. Should you wish to discuss any matters addressed in this letter further, please contact me at (202) 524-6301 or at michael.bright@structuredfinance.org.

Respectfully submitted,



Michael Bright
CEO
Structured Finance Association