September 9, 2024

Comment Intake – Mortgage Servicing
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW, Washington, DC 20552

RE: Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X [Docket No. CFPB-2024-0024; RIN 3170-AB04]

To Whom It May Concern:

The Structured Finance Association (SFA) appreciates the opportunity to provide feedback in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed rule *Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties* (Proposal or Proposed Rule) under the Real Estate Settlement Procedures Act (RESPA) and its implementing regulation, Regulation X.

The SFA is a consensus-driven trade association with over 370 institutional members representing the entire value chain of the United States securitization market. By facilitating responsible issuance and investing of loans and securities, the market provides trillions of dollars of capital to consumers and businesses in communities across the country. SFA members include issuers and investors, broker-dealers, rating agencies, data analytic firms, law firms, servicers, trustees, and accounting firms. 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. 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.

The SFA recognizes the need to streamline and modernize the loss mitigation framework of Regulation X and appreciates the CFPB's efforts to do so. However, SFA is concerned that the Proposed Rule would remove important incentives that encourage borrowers to engage in good faith with their servicer to resolve their delinquency, which would result in unintended negative consequences for borrowers and increase the cost of mortgage servicing, which will ultimately be borne by future borrowers. We urge the CFPB to refine the Proposed Rule by conducting an appropriate cost-benefit analysis and realigning incentives to encourage borrowers to engage with their servicer to resolve their delinquency.

We thank the Bureau for its consideration of our comments and recommendations and welcome the opportunity to discuss the points outlined below at any time.

I. Background and General Comments

a. SFA Supports the Bureau's Goal of Modernizing Regulation X

The COVID-19 pandemic demonstrated that approaches to loss mitigation that were not contemplated in the 2013 Mortgage Servicing Rules (e.g., streamlined loss mitigation options) could be successful for borrowers, servicers, and investors. However, § 1024.41's current rigid document collection requirements make it nearly impossible for servicers to offer streamlined low- or no-documentation loss mitigation options without running afoul of the current anti-evasion rules. Indeed, during the COVID-19 pandemic, the Bureau had to issue several temporary rulemakings to provide servicers with sufficient flexibility to quickly offer borrowers streamlined loss mitigation options. Moreover, current market conditions highlight that loss mitigation approaches that were successful in the wake of the foreclosure crisis, such as reducing the interest rate to the current market rate to lower payments, are less successful in a rising interest rate environment, further supporting the need to modernize Regulation X. These changes in default servicing and market conditions have highlighted several areas where the prescriptive requirements under the 2013 Mortgage Servicing Rules may no longer be optimally effective for borrowers or servicers, and where more flexibility is needed to respond to future changes in the macroeconomic environment.

Accordingly, SFA agrees that the loss mitigation procedures and certain related provisions of Regulation X need modernization. We support eliminating the anti-evasion provision, which has created an unnecessarily complicated and confusing process for borrowers and servicers. Additionally, SFA appreciates and supports the Bureau's continued recognition and deference to investor guidelines, which establish the eligibility criteria and documentation necessary for evaluations.

With that said, and as discussed below, SFA urges the Bureau to reconsider certain provisions of the Proposal that complicate the loss mitigation process, create the potential for borrower abuse, and impose costs that far outweigh the benefits, while failing to accomplish the Bureau's stated goals.

b. The Proposed Rule Misaligns Borrower and Servicer Incentives

To accomplish its stated goal of reducing avoidable foreclosures, the Proposal, among other things, would (i) expand the foreclosure procedural safeguards to begin the moment the borrower requests loss mitigation assistance, (ii) prohibit "servicers from initiating or advancing foreclosure proceedings against borrowers from the moment they request loss mitigation assistance until the mortgage is successfully brought current or one of the procedural safeguards…is met," and (iii) prohibit fees beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract beginning when a borrower requests loss mitigation assistance and continuing through a loss mitigation review cycle. According to the Bureau, these changes would create "strong incentives for servicers to review borrowers for loss mitigation assistance quickly and accurately."[1] To that end, the Proposed Rule makes repeated references to incentivizing servicers to promptly evaluate borrowers for all available loss mitigation options.

While SFA agrees that it is in the best interest of the lender, investor, servicer, and the borrower, to provide prompt and accurate loss mitigation assistance, we are concerned that the Proposed Rule not only reflects the Bureau's faulty perception of mortgage servicers (that servicers are somehow bad actors who need even more incentive to promptly evaluate loss mitigation requests), but would disincentivize borrowers from engaging with their servicer and the loss mitigation process. Nonperforming loans cost significantly more to service than performing loans. Indeed, the Mortgage Bankers Association recently reported that the annual cost of servicing a performing loan in 2023 was $176, while the annual cost of servicing a nonperforming loan was more than 10 times greater, at $1857, and servicers largely bear the disproportionate cost of servicing nonperforming loans.[2] Thus, servicers already have strong incentives to promptly engage with borrowers and find an effective loss mitigation solution. Moreover, SFA believes that the Proposal will incentivize borrowers to prolong the loss mitigation review period or even abuse the process (e.g., by contacting the servicer every 89 days), which, in turn, would not only further increase the cost of servicing nonperforming loans but would increase the chance that certain borrowers will become ineligible for a loss mitigation solution due to excessively large arrearages.[3] Such a result would create unnecessary delays and impose substantial unjustified costs.

SFA supports the goal of properly incentivizing all parties to work in good faith through the loss mitigation process; however, the goal should not be to keep all borrowers in their homes irrespective of cost. Such a goal would significantly increase the cost of mortgage servicing, which will ultimately be borne by future borrowers. The Bureau's regulations should reflect a careful balance between the need to protect distressed borrowers and the reality that regulatory costs impact access to homeownership. Mortgage loan pricing reflects the regulatory costs and risks of lending and servicing. As regulatory costs increase, so does the cost of credit, which negatively impacts access to homeownership. Such outcomes would run contrary to the efforts by the current Administration to improve affordability. The Proposed Rule would increase the underlying regulatory costs and risks related to loss mitigation, which could cause servicers and investors to revise, or participate in fewer, loss mitigation programs or refrain from participating in the market altogether.

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[1] 89 Fed. Reg. 60204, 60205 (July 24, 2024).

[2] *See* Chart of the Week: Annual Cost of Servicing Performing and Nonperforming Loans, MBA Servicing NewsLink (June 25, 2024), *available at*: https://newslink.mba.org/servicing-newslink/2024/june/mba-servicing-newslink-tuesday-june-25-2024/chart-of-the-week-annual-cost-of-servicing-performing-and-non-performing-loans/.

[3] For example, to be eligible for a Fannie Mae Payment Deferral, a borrower cannot be more than six months delinquent at the time of evaluation.

Accordingly, we urge the Bureau to ensure that a final rule amending Regulation X balances the incentives for both servicers and borrowers, reduces complexity, and minimizes borrower confusion.

c. The Bureau Failed to Conduct a Meaningful Cost-Benefit Analysis

Section 1022(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires that the Bureau, in prescribing a rule under the Federal consumer financial laws, to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[4] Similarly, the Administrative Procedures Act (APA) requires that the Bureau "afford interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[5]

As discussed below, for several of the most consequential provisions of the Proposed Rule, including the procedural safeguards, fee protections and language access, the Bureau's cost-benefit analysis lacks any meaningful data or analysis of the costs or benefits to consumers and covered persons, or the potential reduction of access by consumers to consumer financial products or services as required by Dodd-Frank and the APA.

For example, with respect to the proposed fee protections, the Bureau conveniently states that it "does not have data to estimate the average amount of fees that would otherwise be incurred by borrowers during the loss mitigation application process" and devotes all of five sentences to assessing the benefits and costs to covered persons under the Proposed Rule. Moreover, the Bureau asserts that "it is not possible to estimate the number of months borrowers would receive these [fee] protections on average," but then goes on to state, with no support, that it "expects that for many borrowers the protections may apply for less than a month and have no impact on monthly fees incurred (both for borrower benefit and servicer cost) in cases where servicers offer and borrowers accept streamlined loss mitigation options that require little or no documentation."

The Bureau fails to address the true cost of the proposed fee restrictions on servicers given that the Proposed Rule would also prohibit recovery of investor-required third-party costs incurred by servicers. These costs are heightened by the fact that, under the Proposal, a loss mitigation review cycle could continue for months while a borrower is in a temporary or trial loss mitigation period, such as a forbearance or modification trial payment plan, and the loan has not yet been brought current. Thus, contrary to the CFPB's unsubstantiated assertions, a borrower could receive fee protections in excess of six months if the borrower is offered a three-month forbearance plan, followed by a three-month trial payment plan, before having their loan permanently modified. This period would be even longer for extended forbearances (the GSEs, for example, allow up to 12 months of forbearance). Moreover, the proposed fee restrictions would incentivize borrower disengagement, which would result in extended loss mitigation review cycles, undermining the Bureau's goal of incentivizing prompt loss mitigation assistance.

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[4] 12 U.S.C. § 5512(b)(2)(A)(i).

[5] *See*, *e.g.*, *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

Additionally, the Bureau has failed to seriously consider the impact of the proposed procedural safeguards, which would disincentivize borrowers from engaging with their servicer to resolve their delinquency and, in turn, significantly increase the cost to servicers while failing to achieve the goal of ensuring borrowers are provided prompt and effective loss mitigation assistance.

Further, the Proposed Rule's sweeping language access requirements (with no proposed regulatory text), would impose substantial implementation costs and substantial compliance risk on servicers. The Bureau appears to give short shrift to these substantial costs in its cost-benefit analysis, repeatedly stating that the proposed language access requirements "may impose" additional costs to update systems and mail translated notices without any apparent effort to assess the magnitude of these, and other, costs on servicers and impact to the housing finance market at large. As the Urban Institute notes, "the CFPB has required more costly and burdensome measures than is necessary[.]"[6] Indeed, the CFPB has recognized how costly such notices can be in other rulemakings and has declined to adopt such measures.[7]

The Bureau's cursory cost-benefit analysis results in substantial underestimation of the costs to covered persons while wildly overestimating the corresponding benefits to consumers. It is essential that the Bureau conduct a thoughtful and robust cost benefit analysis given that the Proposed Rule will have far-reaching impacts on the housing finance system by (i) misaligning borrower and servicer incentives, (ii) creating opportunities for borrowers to abuse the proposed fee and foreclosure protections, (iii) artificially prolonging the loss mitigation process, and (iv) imposing substantial costs on servicers and investors without balancing those costs against the anticipated benefits to borrowers.

These impacts, both individually and in the aggregate, will result in less demand for mortgage servicing rights (MSRs) – negatively impacting the value of these assets. In turn, reduced demand for MSRs will negatively impact upfront pricing for new originations (to account for decreased MSR values). Such costs will ultimately be borne by future borrowers. The Bureau has conducted no cost-benefit analysis to justify this impact.

Given that the Bureau has not sufficiently calculated or addressed the costs involved in implementing and complying with these proposals, the Bureau's 1022(b) analysis does not appear to meet the requirements of Dodd-Frank. Similarly, for interested persons to be afforded a reasonable and meaningful opportunity to participate in the rulemaking process, as required under the APA, the Bureau must provide any data underlying its analysis. Given that the Bureau has repeatedly admitted that it does not have the data, it has not provided the public with a meaningful opportunity to provide input.

Before issuing a final rule, the Bureau must conduct further analysis and data gathering to define the benefits targeted by these proposals, the associated costs, and whether any less costly alternatives have been considered.

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[6] *See* Comment from Goodman, Laurie (ID CFPB-2024-0024-0025) (Aug. 30, 2024).

[7] 86 Fed. Reg. 5766 (Jan. 19, 2021) (indicating that "the Bureau did not propose to require debt collectors to provide translated validation notices because of the associated costs of such a requirement, and the Bureau is declining to finalize such a requirement in this final rule").

d. Proposed Fee Restrictions Would Undermine the Sanctity of Contract

It is a longstanding principle of U.S. law that once two parties enter a contract, they must fulfill their obligations thereunder. Aside from disincentivizing borrowers from communicating with their servicer (to mitigate against the accumulation of default-related fees), the Bureau's proposed fee restrictions would also have the effect of undermining (and nullifying) the principle that parties should be held to their bargains. Indeed, the fees that would be prohibited under the proposed fee restrictions are not only usual and customary and clearly and conspicuously disclosed, but they represent fees that borrowers agreed to pay in the event of default. In many cases, such fees are not only to compensate the servicer for activities required by contract but also by applicable investor guidelines. Indeed, the fees that would be prohibited under the Proposed Rule are incurred for legitimate activities, many of which are intended to maintain and preserve the investor's interest in the collateral securing the borrower's loan. Deferred maintenance reduces the value of the property (and in extreme cases nearby properties), thus, reducing the amount that may ultimately be recovered. Such an outcome is not only bad for borrowers with equity but would negatively impact investors.

SFA also questions whether the Bureau has the authority to prohibit usual and customary, legally binding, mortgage servicing default-related fees. The Bureau asserts that the Proposed Rule (including the proposed fee restrictions) is grounded in the Bureau's authority under RESPA and the Consumer Financial Protection Act (CFPA).[8] However, none of the statutory provisions on which the Bureau relies grants the Bureau the sweeping authority to promulgate regulations prohibiting or limiting fees a servicer may charge in the loss mitigation context. Moreover, the Bureau does not discuss its legal authority to impose such a prohibition under the Proposed Rule. We urge the Bureau to eliminate this part of the Proposal considering the clear legal constraints on its authority.

e. Proposed Fee Restrictions and the Potential for Lengthy Loss Mitigation Review Cycles Would Negatively Impact the Secondary Market

The proposed restriction on servicers' ability to impose fees and recover third-party costs coupled with the potential for a protracted loss mitigation review cycle will result in servicers incurring uncompensated expenses associated with administering nonperforming loan servicing activities for a lengthy period. This impact is exacerbated by the fact that a "loss mitigation review cycle" would ostensibly continue so long as the borrower was eligible for non-retention home disposition options like a short sale and deed in lieu of foreclosure, eligibility for which can continue indefinitely under many current investor guidelines. Such an outcome will decrease the value of MSRs which will have a substantial negative impact on the secondary mortgage market.

The importance of private capital in the housing finance market cannot be overstated. Indeed, since the housing crisis, policymakers and market experts have called for greater private capital

[8] Specifically, the Bureau asserts that it is relying on Section 6(j)(3) (12 U.S.C. § 2605(j)(3)), Section 6(k)(1)(E) (12 U.S.C. § 2605(k)(1)(E)) and Section 19(a) (12 U.S.C. § 2617(a)) of RESPA as well as Section 1022(b)(1) (12 U.S.C. § 5512(b)(1)) and Section 1032 (12 U.S.C. § 5532) of the CFPA.

participation in the mortgage market.[9] This need is underscored by the fact that approximately 80% of new mortgage loans are originated under government-backed programs. SFA is confident that the private-label securitization ("PLS") market can provide 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 PLS. For right or wrong, the perception now exists that in future economic downturns, private capital in PLS 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 proposed by the Bureau, we encourage the Bureau to consider the environment in which this market is trying to operate. Regulatory risks related to loss mitigation requirements could cause servicers and/or PLS investors to leave the market. 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 may exacerbate trends towards reducing the availability of mortgage lending, particularly for borrowers with less-than-perfect credit.

Against this backdrop, we have set forth below SFA's specific comments and recommendations on the Proposed Rule. We emphasize that many of our comments are interconnected, and we therefore ask the Bureau to consider them holistically.

II. Specific Comments and Recommendations

a. SFA Supports Meaningful Changes to the Loss Mitigation Framework

Under the Proposed Rule, the CFPB would remove most of the existing application-based loss mitigation framework from § 1024.41, including the "anti-evasion" provision; existing provisions regarding loss mitigation application reviews and notices; complete application evaluations and notices; facially complete applications; exceptions for short-term loss mitigation options and COVID-19-related options; notices of complete application; and the associated commentary.

SFA is generally supportive of the Bureau's efforts to revise this impractical framework. The anti-evasion provision undermines the purpose of Regulation X's mortgage servicing provisions, resulting in increased borrower confusion and unnecessary impediments and delays in servicers' ability to quickly provide loss mitigation assistance. However, in revising the loss mitigation framework, the Bureau must ensure that any replacement provides clear rules of the road to determine when borrower protections start and stop and in a manner that is consistent with investor guidelines. Unfortunately, for the reasons discussed below, the Proposed Rule fails to provide clear rules for determining when borrower protections are triggered and when such protections no longer apply.

[9] "The Return of Private Capital," Economic and Strategic Research, Fannie Mae Housing Insights, Volume 4, Issue 7 (2014).

b. The Bureau Should More Clearly Define When Borrower Protections Are Triggered

Under the Proposed Rule, borrower protections (i.e., foreclosure and fee protections) begin once a loss mitigation review cycle begins. This cycle would begin when a borrower makes a request for loss mitigation assistance (provided the request is made more than 37 days before a foreclosure sale) and end when the loan is brought current or when one of the proposed foreclosure procedural safeguards is met. A loss mitigation review cycle continues while a borrower is in a temporary or trial modification and the loan has not yet been brought current.

A "request for loss mitigation assistance" would include any oral or written communication occurring through any usual and customary channel for mortgage servicing communications whereby a borrower asks a servicer for mortgage relief, including a borrower expresses an interest in pursuing a loss mitigation option.[10] According to the Bureau, "a servicer should presume that a borrower who experiences a delinquency has made a request for loss mitigation assistance when they contact the servicer unless they clearly express some other intention."

SFA is generally supportive of a loss mitigation review cycle beginning when a borrower requests loss mitigation assistance. However, the proposed definition of a request for loss mitigation assistance does not provide the appropriate level of specificity to allow servicers (and investors) to objectively determine when a borrower is truly seeking loss mitigation assistance rather than merely inquiring about the loss mitigation process. Furthermore, we strongly disagree with the Bureau's assertion that servicers should "presume that a borrower who experiences a delinquency as defined in §1024.31 has made a request for loss mitigation assistance when they contact the servicer unless they clearly express some other intention." This presumption will lead to borrower confusion and will require servicers to devote resources to engage with borrowers who may not have a genuine interest in pursuing loss mitigation. Such a presumption is also inconsistent with the Bureau's experience during COVID-19, when the Bureau criticized servicers for presuming that delinquent borrowers should automatically be enrolled in forbearance.[11]

Accordingly, we urge the Bureau to revise the definition of "loss mitigation review cycle" so that the review period would begin when a borrower requests loss mitigation assistance from the servicer <u>and</u> affirmatively expresses an intent to proceed with loss mitigation.

[10] The definition is to be interpreted broadly to include (i) a borrower who expresses an interest in pursuing a loss mitigation option, (ii) a borrower who indicates that they have experienced a hardship and asks the servicer for assistance with making payments, retaining their home, or avoiding foreclosure, <u>or</u> (iii) in response to a servicer's unsolicited offer of a "loss mitigation option" (as that term is currently defined in Regulation X), a borrower expresses an interest in pursuing either the loss mitigation option offered or any other loss mitigation option.

[11] CFPB Supervisory Highlights, COVID-19 Prioritized Assessments Special Edition, Issue 23, Winter 2021.

c. The Proposed Loss Mitigation Review Cycle Should Have a Clearly Defined "Off-Ramp" To Reduce Unnecessary Delays and Potential Borrower Abuse

As noted above, a "loss mitigation review cycle" would end (along with the associated fee and foreclosure protections) when the loan is brought current or one of the following two procedural safeguards is met: (1) there are no remaining loss mitigation programs for which the borrower is eligible, the servicer has sent the borrower all required notices, and the borrower has not requested any appeal within the applicable time period or, if applicable, all of the borrower's appeals have been denied ("No Remaining Options Safeguard"), or (2) the borrower is unresponsive for at least 90 days, despite the servicer having regularly taken steps to contact the borrower ("Unresponsive Borrower Safeguard"). As noted above, a loss mitigation review cycle would continue while a borrower is in a temporary or trial loss mitigation period, such as a forbearance or modification trial payment plan, and the loan has not yet been brought current.

SFA believes that, as proposed, the loss mitigation review cycle is likely to be substantially longer than the Bureau expects and would disincentivize borrowers from actively engaging with their servicer to promptly resolve their delinquency. Notably, the proposed loss mitigation review cycle would essentially function as a forbearance plan with virtually no eligibility requirements or cut-offs. Without proper incentives in place for borrowers to engage with servicers quickly and meaningfully, not only will borrowers' delinquencies increase unnecessarily (and reduce the likelihood that the borrower will remain eligible for loss mitigation options), but servicers would continue to incur costs and advance missed payments to investors. Moreover, by incentivizing borrower disengagement, while simultaneously prohibiting servicers from initiating, advancing, or completing a foreclosure, the Proposed Rule will put investors and servicers in the position of navigating state laws with strict foreclosure statutes of limitations (e.g., the New York Foreclosure Abuse Prevention Act[12]). As a result, this Proposal could have unintended consequences for borrowers, such as an increase in the cost of credit to offset the increased losses that investors and servicers will incur. Such a result would be most acutely felt by low- and moderate-income borrowers.

i. The "No Remaining Options Safeguard" May Result in Investors Offering Fewer Loss Mitigation Options

The Proposed Rule lacks clarity as to when a servicer can determine that no available loss mitigation programs remain. For example, the No Remaining Options Safeguard does not address situations in which a borrower declines a loss mitigation offer. Indeed, the Proposed Rule would permit a borrower to "decline an offer for a specific type of loss mitigation and seek first to learn what other options exist…and the borrower may later decide [after having been reviewed for other options] that [the borrower] would like to accept the offer that they previously declined."

We strongly recommend that a Final Rule provide that a loss mitigation review cycle ends if the servicer has offered the borrower a loss mitigation option and the borrower has not accepted it within the applicable timeframe. The loss mitigation review cycle also would end if the borrower has been evaluated for all available loss mitigation options, has been denied for such options, and

[12] New York Assembly Bill 7737b (Dec. 30, 2022).

the applicable appeal period has expired, or all appeals have been exhausted. If borrowers can decline an offer and at a later and unspecified time inform a servicer that they want to accept it, it would complicate and extend the loss mitigation review cycle. This will result in further delays and costs to investors and servicers. In response, investors may limit the number of loss mitigation options offered or revise eligibility criteria for existing loss mitigation options, which could have unintended consequences for borrowers facing hardship and the mortgage industry at large.

In addition, SFA is supportive of the Bureau's statement in the Preamble to the Proposed Rule that the "proposed framework would allow servicers to evaluate borrowers more quickly and would provide flexibility to the servicer so that the servicer would not need to review the borrower for non-retention options in instances where the borrower has indicated they would like to remain in the home."[13] However, we urge the Bureau to clarify that the foreclosure process could commence or proceed even if certain non-retention options, like a deed-in-lieu of foreclosure, may be "available," as such options may exist for a significant amount of time. Absent such clarification, investors are likely to eliminate or significantly restrict the time in which home disposition options like "short sales" and "deeds in lieu of foreclosure" are available because otherwise they will have to keep in place a foreclosure hold indefinitely. This outcome would harm both borrowers and investors, directly contrary to the concept of loss mitigation.

ii. The "Unresponsive Borrower Safeguard" Could Result in Indefinite Loss Mitigation Review Cycles

As proposed, the Unresponsive Borrower Safeguard lacks sufficient clarity and could result in a loss mitigation review cycle continuing indefinitely if a borrower were to contact their servicer once every 90 days (ostensibly about any issue, even if unrelated to loss mitigation) and then remain unresponsive for the next 89 days. This safeguard would also undermine the Bureau's stated goal of ensuring borrowers are quickly evaluated for loss mitigation assistance, as the Proposed Rule would not prevent a borrower from delaying the loss mitigation review process by providing their servicer with requested information in a piecemeal fashion over the course of several months before the servicer could even begin to evaluate the borrower's loss mitigation request. This issue would be further exacerbated if the duplicative request framework (aka "one bite at the apple") is removed, since a borrower could potentially enter any number of new loss mitigation review cycles if they request loss mitigation assistance even after the 90-day period has expired. The likelihood of either scenario is increased considering the broad fee and foreclosure protections which, as noted elsewhere, would create incentives for borrowers to remain disengaged with their servicer during the loss mitigation review process.

If the Bureau finalizes the Unresponsive Borrower Safeguard, we recommend that it be narrowly defined to make clear that in order for a borrower contact to reset the unresponsiveness period (currently proposed as 90 days), such contact must (1) occur through a usual and customary mortgage servicing channel specifically designated for loss mitigation; and (2) the borrower communication must be related to their request for loss mitigation assistance. Additionally, even if there has been borrower contact through mortgage servicing channels related to loss mitigation, we propose that the review cycle will conclude 30 days (rather than 90 days) from the date on

[13] 89 Fed. Reg. 60204, 60232.

which the servicer requested information from the borrower in order to complete their loss mitigation review, as a 30-day period is more reasonable, properly motivates borrower action, is more directly tied to the Bureau's objective to deliver loss mitigation to the borrower quickly, and would reduce the costs that would be borne by investors and servicers.

d. The Scope of the Fee and Foreclosure Protections is Overly Broad

The Proposed Rule would significantly expand borrower protections by (i) prohibiting foreclosure initiation or advancement (including sale, scheduling, or completion) if a borrower requests loss mitigation assistance more than 37 days before a foreclosure sale unless one of the foreclosure procedural safeguards are met; and (ii) prohibiting a servicer from charging fees to a borrower beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract during a loss mitigation review cycle. As set forth below, certain clarifications are needed.

i. The Bureau Should Provide Necessary Exceptions and Clarifications to the "No Advancing Foreclosure" Protection

The final rule must recognize that the foreclosure process is heavily regulated by state law, which can have nuances from state to state (e.g., restart states). Accordingly, the final rule should contain exceptions for foreclosure actions that are court-ordered, borrower requested, or necessary to preserve the statute of limitations (e.g., New York Foreclosure Abuse Prevention Act), including mediation.

In addition, to ensure consistency and provide clarity to the industry, the final rule should provide a reasonable timeline for servicers to implement foreclosure protections upon a borrower's request for assistance. For example, we understand that approximately 12 jurisdictions require that foreclosures be restarted rather than placed on hold. The Proposed Rule would effectively require that a servicer stop foreclosures in these jurisdictions to prevent foreclosure from advancing. Because foreclosures in certain jurisdictions cannot simply be put on hold (or may take additional time to do so), the final rule should provide servicers with sufficient time to take the appropriate steps to stop foreclosure activity in these jurisdictions. This problem is exacerbated for written requests for loss mitigation assistance, which must be reviewed by servicers before beginning the loss mitigation review cycle and triggering borrower protections.

ii. The Bureau Should Not Prohibit Fees During a Loss Mitigation Review Cycle

The proposed amendments to § 1024.41(f)(3) would prohibit fees beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract beginning when a borrower requests loss mitigation assistance and continuing throughout a loss mitigation review cycle. According to the Bureau, this prohibition would encompass usual and customary amounts imposed on a borrower's account directly by the servicer, as well as payments to third party companies for delinquency-related services. Thus, the proposed fee prohibition does not distinguish between a servicer fee (such as a late fee, stop payment fee, insufficient funds fee) and third-party cost (such as valuation, property preservation, or attorney's fees).

Setting aside the question of whether the Bureau has the authority to prohibit fees during a loss mitigation review cycle (which we discuss above), SFA has several material concerns with the Bureau's proposed fee protections.

First, servicers should not be prohibited from collecting usual and customary fees as a purported incentive for completing the loss mitigation process with borrowers. As drafted, the Proposed Rule would disincentivize borrowers from engaging with their servicer, since the proposed fee protections would automatically apply once a borrower requests loss mitigation assistance (assuming the request is made more than 37 days before a foreclosure sale). This proposal would eliminate any incentive for the borrower to mitigate the accrual of fees (and cure their delinquency) by engaging in good faith loss mitigation discussions with their servicer.

Second, as noted above, the Bureau's proposal would interfere with investors' and/or servicers' contractual rights with borrowers by prohibiting the collection of penalties for a borrower's breach of contract (i.e., with respect to late payments and interest accrual) as well as legitimate third-party costs that are authorized by the loan agreement and/or applicable law and that protect the investor's security interest in the property.

Third, as noted elsewhere in this letter, the Bureau's cost-benefit analysis fails to consider the true costs that the proposed fee restrictions will impose on the industry versus the benefit to consumers, and it is not evident that the Bureau attempted to collect this information. The Bureau also does not consider the implications of the proposed fee restrictions on the secondary market (by decreasing the value of MSRs) and the potential of investors limiting available loss mitigation options – all of which may lead to a potential reduction of access by consumers to consumer financial products and services.

We urge the Bureau not to finalize this prohibition. Notwithstanding the foregoing, if the Bureau were to finalize this prohibition, the Bureau should limit the scope of covered fees to servicer fees such as late fees and NSF fees. Other charges, such as third-party costs and accrued interest, should be outside the scope of any fee prohibition. The Bureau should also clarify that servicers are not prohibited from collecting fees and charges that are <u>incurred</u> prior to the borrower's request for loss mitigation, including any costs associated with stopping or pausing a foreclosure in response to a borrowers request for loss mitigation assistance, even if such amounts have not yet been billed when the borrower requests loss mitigation assistance. Such clarification would not only be consistent with the plain language of the Proposed Rule (which provides that fee protections would only apply upon a borrower's request for loss mitigation assistance) but will ensure that servicers are compensated for legitimate expenses incurred because of a borrower's default prior to a request for loss mitigation.

Moreover, while the Proposed Rule specifies that fee protections would only attach during the loss mitigation review cycle, it does not clarify if and when a servicer may resume accruing fees and when such fees can be collected, such as through a reinstatement, capitalization of fees during a loan modification, or a foreclosure sale if one of the procedural safeguards is satisfied. The impact of the proposed fee protections is exacerbated by the fact that a loss mitigation cycle can effectively continue indefinitely, as nothing in the Proposed Rule would prohibit a borrower from repeatedly requesting loss mitigation assistance to trigger new fee protections.

We ask the CFPB to consider carefully how its regulatory actions will impact the market's ability to serve all American communities. Negative unintended consequences of regulation may exacerbate trends towards reducing the availability of mortgage lending, particularly for borrowers with less-than-perfect credit. The Bureau must ensure that a final rule balances the needs of servicers to review borrowers quickly for available loss mitigation options with the need to incentivize borrowers to engage their servicer for assistance (and to remain engaged throughout the loss mitigation process). The Bureau must also recognize that certain costs should be able to be passed on to the borrower at some point.

e. The Proposed Rule Should Retain the Current "One Bite at the Apple" Duplicative Request Framework

Currently, a servicer is not required to comply with the requirements of 12 C.F.R. § 1024.41 for a borrower's loss mitigation application, if the servicer has previously complied with the requirements of this section for a complete loss mitigation application and the borrower has remained delinquent at all times since submitting the prior complete application.[14]

The Proposed Rule removes this exception by providing that a servicer is required to comply with the requirements of revised § 1024.41 for a borrower's request for loss mitigation assistance <u>during the same loss mitigation review cycle</u> (unless one of the procedural safeguards have been met[15]). As a result, a borrower is permitted to re-request loss mitigation assistance indefinitely (for the same delinquency) and, thus, beginning a new loss mitigation review cycle (with the associated foreclosure and fee protections).

The scope of this provision, as proposed, is unworkable in practice and would facilitate borrower abuse. It is unclear what, if any, benefit the Proposed Rule would afford borrowers who are already in a loss mitigation review cycle, since a borrower's ability to re-request loss mitigation assistance (while already in a loss mitigation review cycle) would not afford the borrower any greater protection, as a servicer would already have an obligation to review the borrower for all loss mitigation options and, for unresponsive borrowers, regularly take steps to reach such borrowers.

[14] 12 C.F.R. § 1024.41(i).

[15] The procedural safeguards would be met if (1) the servicer has reviewed the borrower for loss and no available loss mitigation options remain, the servicer has sent the borrower all notices required by proposed § 1024.41(c), if applicable, and the borrower has not requested any appeal within the applicable time period or, if applicable, all of the borrower's appeals have been denied; or (2) the servicer has regularly taken steps to identify and obtain any information and documents necessary from the borrower to determine which loss mitigation options, if any, it will offer to the borrower, and, if the servicer has made a loss mitigation determination, has regularly taken steps to reach the borrower regarding that determination, but the borrower has not communicated with the servicer for at least 90 days.

To the extent that the Bureau intended for this to be a non-substantive, conforming change, we ask the Bureau to clarify that once a loss mitigation review cycle ends, borrower protections do not apply for a subsequent loss mitigation review cycle if the borrower has been delinquent at all times since submitting their prior request for loss mitigation assistance.

f. The Bureau's Proposed Language Access Requirements Would Negatively Impact the Secondary Market and Should Not Be Incorporated into a Final Rule

Without proposed regulatory text, it is impossible for SFA to meaningfully assess or provide specific comments to the broad language access requirements contemplated by the Bureau. That being said, based on the Bureau's descriptions of the language-related changes under consideration, it is clear that the Proposed Rule's sweeping language access requirements would impose substantial implementation costs and compliance risk on servicers, which will have adverse downstream impacts on borrowers. In addition, the proposed language access requirements for loans marketed in a language[16] other than English is likely to chill in-language marketing efforts and ultimately result in less access to credit as lenders who retain MSRs would understandably want to avoid the onerous obligations in the Proposal. These proposals will negatively impact the secondary market and increase the cost of credit. Such costs will ultimately be borne by future borrowers. Indeed, as noted by the Urban Institute, "[i]f the CFPB's provisions stand as written, the likely unintended consequence is an increase in servicing fees on all borrowers to compensate for what the [B]ureau is currently proposing."[17]

Because the Bureau has failed to conduct a meaningful analysis of the costs and benefits the Proposed Rule would impose on consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such a rule, SFA urges the Bureau to exclude the language access-related changes under consideration from the final rule until the Bureau has (i) conducted an appropriate cost-benefit analysis, (ii) issued proposed regulatory text, and (iii) provided stakeholders with a reasonable opportunity to review and comment thereon.

SFA also questions whether the Bureau has the requisite authority to promulgate language access requirements in the context of loss mitigation and default servicing. As noted above, the Bureau asserts that the Proposed Rule (including the language access changes under consideration) is grounded in the Bureau's authority under RESPA and the CFPA. However, none of the statutory provisions on which the Bureau relies grants the Bureau the sweeping authority to promulgate regulations imposing language access requirements in the context of loss mitigation (or default servicing, more broadly). Moreover, the Bureau does not sufficiently discuss its legal authority to impose such requirements under the Proposed Rule. We urge the Bureau to eliminate this part of the Proposal considering the legal constraints on its authority.

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[16] The Proposed Rule would require that, if a borrower received marketing for their mortgage loans before origination in a language other than English, and the servicer knows or should have known about that marketing, the servicer make available translations or interpretations for that language.

[17] *See* Comment from Goodman, Laurie (ID CFPB-2024-0024-0025) (Aug. 30, 2024).

g. The Bureau Should Simplify the Proposed Notice Requirements and Encourage Borrowers to Contact Their Servicers Rather Than Investors

The Proposed Rule would require that both the early intervention and loss mitigation determination notices identify investors and list all loss mitigation options available from the investor. Identification of the investor would provide little benefit to consumers, as servicers (not investors) are responsible for conducting day-to-day servicing activities and are best positioned to respond to borrower inquiries or complaints. Additionally, to avoid the risk of providing stale or inaccurate information to borrowers about loss mitigation options they may no longer qualify for,[18] the Bureau should avoid overcomplicating notice requirements and instead encourage the borrower to contact their servicer to discuss details about their loss mitigation review and available options.

In addition to these operational challenges, such a requirement may lead to increased litigation against investors, which would have a chilling effect on private capital in the mortgage market, and ultimately lead to higher borrowing costs. Accordingly, SFA urges the Bureau to remove the proposed notice requirements from the final rule to avoid unnecessary operational challenges and borrower confusion.

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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 Dallin.Merrill@StructuredFinance.org .

Respectfully submitted,

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Dallin Merrill
Senior Director, MBS Policy
Structured Finance Association

[18] Eligibility for loss mitigation can change over time based on a variety of factors, such as (but not limited to) delinquency, borrower hardship, affordability, and prior loss mitigation activity. For example, a borrower could be eligible for a loss mitigation option as of the date of a determination notice but may no longer be eligible the following month if the delinquency no longer meets investor requirements.