

October 5, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20006-4702

Re: **2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal (Docket No. CFPB-2012-0034, RIN 3170-AA14) and 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing Proposal (Docket No. CFPB-2012-0033, RIN3170-AA14)**

Dear Mr. Cordray:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the proposed rules on *2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal*¹ and *2012 Truth in Lending Act (Regulation Z) Mortgage Servicing Proposal*.²

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

¹ 77 Fed. Reg. 57200, September 17, 2012.

² 77 Fed. Reg. 57318, September 17, 2012.

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁵ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁶

In July 2010, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act or Dodd-Frank).⁷ Section 1011 of the Act establishes the Consumer Financial Protection Bureau (CFPB) to supervise certain activities of financial institutions. Section 1100G, entitled "Small Business Fairness and Regulatory Transparency," amends 5 U.S.C. § 609(d), to require the CFPB to comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process, making it the third agency with this responsibility, joining EPA and OSHA.

The SBREFA panel process requires the CFPB to conduct special outreach efforts to ensure that small entity views are carefully considered prior to the issuance of a proposed rule, if the rule is expected to have a significant economic impact on a substantial number of small entities. This outreach is accomplished through the work of small business advocacy review panels, often referred to as SBREFA panels, consisting of a representative or representatives from the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and the Chief Counsel for the Office of Advocacy. The panel solicits information and advice from small entity representatives (SERs), who are individuals who represent small entities affected by the proposal. SERs help the panel better understand the ramifications of the proposed rule. The product of a SBREFA panel's work is its panel report on the regulatory proposal under review. The CFPB convened a SBREFA panel for this rulemaking.

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. Advocacy held a conference call on this issue on September 21, 2012.

The Notice for the Proposal Was Inadequate

The proposed rules were posted on Regulations.gov on August 10, 2012. However, the proposals were not published in the *Federal Register* until September 17, 2012.⁸ As such, a small entity that relies on the *Federal Register* for regulatory information would be unaware of the proposal and have less than 30 days to prepare a response. Section 553 of the Administrative Procedure Act specifically states that the general notice of proposed rulemaking shall be published in the *Federal Register*. In addition, the Regulatory Flexibility Act (RFA) states that the initial regulatory flexibility analysis (IRFA) shall be

⁵ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁶ *Id.*

⁷ Public Law 111-203.

⁸ 77 *Fed. Reg.* 7200, 77 *Fed. Reg.* 57318.

published in the *Federal Register*.⁹ The intent of both is to assure that the public has adequate notice and an opportunity to comment on rulemakings. Advocacy asserts that less than 30 business days to review and develop a public comment is inadequate.

The Rulemaking

On September 17, 2012, the Consumer Financial Protection Bureau (CFPB) published in the Federal Register two proposed rules. One to amend Regulation X, the Real Estate Settlement Procedures Act (RESPA) and the other to amend Regulation Z, the Truth in Lending Act (TILA). The proposals implement the Dodd-Frank Act.

The proposal to amend RESPA addresses servicer obligations. The purpose of the proposal is to correct errors encountered by mortgage loan borrowers; to provide information requested by mortgage loan borrowers; to ensure that a reasonable basis exists to obtain force-placed insurance; to establish reasonable information management policies and procedures; to provide information about mortgage loss mitigation options to delinquent borrowers; to provide delinquent borrowers access to servicer personnel with continuity of contact about the borrower's mortgage loan account; and to evaluate borrowers' applications for available loss mitigation options. The proposal would also modify and streamline certain existing servicing-related provisions of RESPA, such as disclosures about mortgage transfers and the mortgager's obligation to manage escrow accounts.¹⁰

The proposal to amend TILA implements Dodd-Frank Act sections addressing initial rate adjustment notices for adjustable-rate mortgages (ARMs), periodic statements for residential mortgage loans, and prompt crediting of mortgage payments and response to requests for payoff amounts. The proposed revisions also amend current rules governing the scope, timing, content, and format of current disclosures to consumers occasioned by the interest rate adjustments of their variable-rate transactions.¹¹

At the SBREFA panel SERs meeting, small servicers indicated that the proposals were not consistent with their business practices. They expressed concerns about the amount of documentation needed for compliance and the costs and burdens of complying with the periodic statement requirements.¹²

Periodic Statement

Section 1420 of the Dodd Frank Act requires periodic statements for residential mortgages to be provided at each billing cycle. It requires particular information in the statement and that the CFPB develop and prescribe a standard form for the periodic

⁹ 5 U.S.C. § 603.

¹⁰ 77 *Fed. Reg.* 57200.

¹¹ 77 *Fed. Reg.* 57318.

¹² 77 *Fed. Reg.* 57326.

statement. Dodd-Frank exempts the periodic statement requirement for fixed rate loans if the creditor, assignee or servicer provides a coupon book.¹³ It also exempts timeshares.¹⁴

The CFPB is proposing to amend the periodic statement to provide additional information in a format that is easily understandable for the consumers. It will clarify things such as the handling of partial payments, how to release unapplied funds, list payment options, etc.¹⁵ It also has particular formatting requirements.¹⁶

All Small Entities Should Be Exempt from the Periodic Statement Requirement

In the TILA proposal, the CFPB is proposing a small servicer exemption for servicers who service 1,000 or fewer loans from the periodic statement requirement.¹⁷ As noted above, Advocacy held a conference call to discuss the proposed rulemakings. The SERs on the call were in favor of the exemption. However, they stated that the 1,000 loan threshold was too low. The SERs have stated that a 5,000 or 10,000 loan threshold would be more appropriate for the exemption. The IRFA indicates that the 1,000 loan threshold is also excluding some of the small servicers.¹⁸ Advocacy encourages the CFPB to exempt all small entities from the requirement.

Rate Change Notification

Section 1418 of Dodd-Frank requires servicers of hybrid ARMs with a fixed rate introductory period to provide six months notice prior to the initial reset period. Section 1418 permits the CFPB to extend the requirement to ARMs that are not hybrid ARMs. In addition, under current law a creditor must provide consumers with notice of an interest rate adjustment at least 25 days but no more than 120 calendar days before a payment at the new level is due. The CFPB is proposing to change the minimum time for providing advance notice from 25 days to 60 days.

At the SBREFA SERs meeting, the small entities adamantly opposed this change. They stated that it would be confusing to consumers. Since the rate could change during the six month period, it may not reach the goal of providing meaningful notice to the consumer. In addition, it will be costly for the small servicers to change their systems to comply with the new requirements. Since changes are not statutorily required for non-hybrid ARMs, Advocacy encourages the CFPB to exempt small entities from the non-required rate change notification provisions of the proposal.

¹³ 77 Fed. Reg. 57328.

¹⁴ 77 Fed. Reg. 57239.

¹⁵ 77 Fed. Reg. 57329.

¹⁶ Id.

¹⁷ 77 Fed. Reg. 57381.

¹⁸ Id.

Error Resolution

Dodd-Frank prohibits certain acts and practices by servicers with regard to resolving errors and responding to request for information. Specifically, the statute prohibits servicers from charging fees for responding to written requests. It requires a servicer to respond timely to correct errors relating to allocation of payments, final balances for pay-off, avoiding foreclosure or other standard servicer duties. It also requires servicers to respond within 10 business days to the borrower about the identity, address and other relevant information about the assignee of the loan. It requires the correction of errors generally and to respond to inquiries generally as well as to refund escrow payments upon payoff.¹⁹

In the RFA section, the CFPB notes that written notice is not required if the servicer provides the information to the borrower within five days.²⁰ In Advocacy's conference call with the SERs, the SERs raised a concern about documenting compliance when the issue is resolved in less than five days. It was stated that depending on the vendor, the small servicers may need to redo their software to generate a report for compliance officers. Advocacy encourages the CFPB to provide guidance on complying with the less-than-five-days aspect of the proposal. In addition, Advocacy encourages the CFPB to provide sufficient time for the vendors to make the necessary changes to their software prior to the effective date of the proposed rule.

Effective Date Should Be Delayed

The Dodd-Frank Act requires rules to be in place by January 21, 2013. If the rules are not in place, Dodd-Frank becomes self-executing. However, if the rules are in place, Dodd-Frank allows the CFPB to delay the implementation for up to 12 months.²¹

The mortgage industry in general continues to adjust to the changes required by Dodd-Frank. This proposal requires additional changes to software and other business systems. According to the SERs, the changes in the proposal are very complicated to make and could take 18-24 months to complete. Advocacy encourages the CFPB to provide the SERs with a sufficient amount of time for them to comply with the requirements of this proposal.

Conclusion

At the SBREFA panel meeting with the SERs, those small business representatives were adamant that Dodd-Frank addresses problems that were not created by small mortgage servicers. Community banks and small credit unions are relationship lenders. The

¹⁹ 77 Fed. Reg. 57324.

²⁰ 77 Fed. Reg. 57289.

²¹ 77 Fed. Reg. 57326.

smaller lenders are intimately aware of, and connected to, their borrowers. They work closely with their borrowers to provide service and address problems. Since they service a small number of loans, they are able to provide greater customer service. However, changes to their current model could be unduly burdensome considering their revenue. This is exactly the type of problem that the RFA was intended to address.

Advocacy encourages the CFPB to use its exemption authority to exempt small servicers from as much of this proposal as it can. Imposing unduly burdensome rules on small servicers not only hurts their businesses, it also harms consumers. If the small servicers leave the market due to these regulations, the price of services will go up due to the reduced pool of providers. This could result in more business for the larger providers that caused the underlying problem. If small servicers cannot be exempt, Advocacy encourages the CFPB to delay the implementation period as long as possible. In addition, Advocacy reiterates its concern about the lack of adequate notice for small entities about this important proposal.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Jennifer A. Smith
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For Economic Regulation & Banking

Cc: Boris Bershteyn, Acting Administrator, OIRA