COMMENTS

to the

Consumer Financial Protection Bureau

12 CFR Parts 1024 & 1026

[Docket No. CFPB-2014-0033]

RIN 3170-AA49

Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

by the

National Consumer Law Center
(on behalf of its low income clients)

and the

National Association of Consumer Bankruptcy Attorneys

March 16, 2015

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The **National Consumer Law Center,**[1] on behalf of its low-income clients, and the **National Association of Consumer Bankruptcy Attorneys**,[2] submit the following comments in response to the Bureau's proposed amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z). We applaud the Bureau for considering our comments to the October 2013 Interim Final Rule (IFR) and for proposing in this docket a much improved set of bankruptcy exemptions to the mortgage servicing rules. We hope the Bureau will retain in the final rule the many consumer protections contained in the proposal. We also urge the CFPB to make further changes before the rules take effect.

Both NCLC and NACBA are submitting additional comments in a separate document on the non-bankruptcy proposed amendments to the 2013 Mortgage Rules. The comments submitted here focus exclusively on the proposals to amend the bankruptcy exemptions created by the IFR.

I. The Proposed Exemption for Early Intervention Notifications for Borrowers in Bankruptcy. [Section 1024.39(d)(1)]

The Bureau correctly noted when first promulgating the 2013 RESPA Servicing Rule that a borrower could have filed for bankruptcy but still be eligible for loss mitigation assistance.[3] Rather than create a broad bankruptcy exemption, the Bureau's initial final rule and commentary on early intervention, by adopting § 1024.39(c), reflected the view that concurrent compliance with RESPA and the Bankruptcy Code is feasible and appropriate. However, the October 2013 Interim Final Rule (IFR) created a complete bankruptcy exemption that took away from servicers the discretion to adapt early intervention notifications in a manner that would be consistent with existing loss mitigation programs and the Bankruptcy Code.

The proposed amendment to § 1024.39(d) adopts a more balanced approach and places important limitations on the bankruptcy exemption. However, the exemption should not be based on the availability of loss mitigation options and it should be amended to more appropriately deal with borrowers who are no longer in a bankruptcy case. We also request that the Bureau not adopt the early intervention exemption as proposed for a borrower in bankruptcy who has sent an FDCPA "cease communication" notice.

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[1] Since 1969, the nonprofit **National Consumer Law Center®** (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC publishes a series of consumer law treatises including Mortgage Lending, Truth in Lending, and Foreclosures and Mortgage Servicing. These comments are written by NCLC attorney John Rao.

[2] The **National Association of Consumer Bankruptcy Attorneys** (http://www.nacba.org) is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA now has 3,000 members located in all 50 states and Puerto Rico.

[3] *See* Section-by-Section Analysis, § 1024.39(b), 78 Fed. Reg. 10807 (Feb. 14, 2013).

A. The Bureau should clarify that the exemption for the live contact requirement is permissive.

We generally support proposed § 1024.39(d)(1)(i), which would not compel servicers to comply with the live contact requirements when the borrower on a mortgage loan is a debtor in a bankruptcy case, or when any borrower is a debtor in a chapter 12 or chapter 13 bankruptcy. However, there are circumstances where live contact with a borrower in bankruptcy can be appropriate and would not violate the automatic stay. We therefore urge the Bureau to include a comment stating that the Bureau 1) does not take a position as to whether early intervention efforts might violate the Bankruptcy Code's automatic stay or discharge injunction, and 2) encourages servicers that have communicated with borrowers in bankruptcy about loss mitigation options using live contacts to continue this practice despite the exemption.

B. The availability of loss mitigation options should not determine whether a borrower in bankruptcy is sent the early intervention written notice.

We support the Bureau's proposal to lift, except in limited circumstances, the current exemption for the written early intervention notice requirements of § 1024.39(b). We believe that the exemptions set out in proposed § 1024.39(d)(1)(ii)(B) through (D), relating to the surrender of the property securing the mortgage or the avoidance of the mortgage lien, are appropriate. However, we have concerns with proposed § 1024.39(d)(1)(ii)(A), which attempts to make the written notice generally available to borrowers who do not fall under the other specific exemptions. Oddly, it refers to a borrower who would be exempt based on the conditions identified in proposed § 1024.41(d)(1)(i) for the live contact exemption **and for which "no loss mitigation options are available."** Thus, the critical triggering condition for the exemption is the unavailability of loss mitigation options.

This would appear to require the servicer to make an individualized determination with respect to the borrower about the availability of options before sending the written notice. When the 2013 RESPA Servicing Rule was first issued, the Bureau rejected such a requirement for the early intervention written notices:

> The Bureau is not requiring servicers to provide each borrower with an individually tailored written notice about that borrower's options because the Bureau does not believe it would be practicable for servicers to provide such a notice at this stage of a borrower's delinquency or without additional information about a borrower's particular circumstances.[4]

In current comment 39(b)(2), servicers are instructed that they may include a generic list of loss mitigation options that they offer to borrowers, without making a determination whether the borrower receiving the notice would qualify for the listed options. Importantly, nothing in the current regulation or comment would excuse a servicer from sending the written notice if no loss mitigation options are available. This is further reinforced by proposed comment 39(b)(2), which provides that if loss mitigation options are available, a servicer must include in the written

[4] *See* Section-by-Section Analysis, § 1024.39(b)(2), 78 Fed. Reg. 10802 (Feb. 14, 2013).

notice the disclosures required by § 1024.39(b)(2)(iii) and (iv). The proposed comment further explains that loss mitigation options are available if the owner or assignee of the mortgage loan generally makes alternatives to foreclosure available through the servicer, irrespective of the borrower's eligibility for those alternatives. The obvious implication from the proposed comment and current regulation is that if no loss mitigation options are available, the written notice must still be provided, absent the disclosures required by § 1024.39(b)(2)(iii) and (iv). The requirement to provide the written notice does not turn on whether loss mitigation options are available.

As a general rule, the same loss mitigation options are available to borrowers inside and outside (and after) bankruptcy. Borrowers in active chapter 7 or chapter 13 bankruptcy cases must be considered for HAMP under guidelines adopted by the Department of Treasury and the GSEs if the borrower, the borrower's counsel, or the bankruptcy trustee (with the borrower's permission) submits a request to the servicer.[5] In addition, the guidelines for these programs provide that a debtor whose bankruptcy case is no longer active is eligible and may be solicited for a HAMP modification, even if the debtor obtained a chapter 7 discharge and the debt was not reaffirmed.[6] The Bureau's limitation in proposed § 1024.39(d)(1)(ii)(A) would perpetuate a misconception that some servicers have that bankruptcy is a disqualification for certain loss mitigation options.

As drafted, proposed § 1024.39(d)(1)(ii)(A) makes the availability of loss mitigation options a condition for whether or not a borrower in bankruptcy will be sent the early intervention written notice. We are concerned that the proposal will lead to erroneous determinations by servicers about the availability of options based on incomplete information, depriving borrowers of the written notice. It could provide an improper excuse for noncompliance. The Bureau states in the section-by-section analysis that proposed comment 39(b)(2) is intended to assist servicers in determining whether they are exempt from providing the written notice under proposed § 1024.39(d)(1)(ii), which helps clarify that the exemption in proposed § 1024.39(d)(1)(ii)(A) should not involve an individualized determination as to the borrower's eligibility for options. However, proposed comment 39(b)(2) provides commentary on the content of the written notice and it does not expressly state that it is applicable to the exemption under proposed § 1024.39(d)(1)(ii). Even if proposed comment 39(b)(2) is made expressly applicable, we believe that the bankruptcy exemption should be consistent with the overall early intervention policy: the availability of loss mitigation options should affect only the disclosures required by § 1024.39(b)(2)(iii) and (iv), not whether the written notice should be provided at all. There is nothing unique about bankruptcy that warrants a departure from the Bureau's current policy.

[5] *See* Making Home Affordable Handbook for Servicers of Non-GSE Mortgages, Ch. II, § 1.2; Freddie Mac Single Family Servicer Guide § C65.7.1; Fannie Mae Single Family Servicing Guide § 609.01.
[6] *See* MHA Handbook Ch. II §§ 1.2, 10.1; Fannie Mae Single Family Servicing Guide § 609.01; Freddie Mac Single Family Servicer Guide § C65.7.1; HUD Mortgagee Letters 2008-32 and 2013-32.

C. The early intervention exemption should not apply to borrowers who are paying their mortgages and no longer in a bankruptcy case.

The early intervention exemption should not be permanent with respect to a borrower who has discharged the mortgage debt. Proposed comment 39(d)(1)-1(i), which describes when compliance with the live contact and written notice requirements must resume, appears to exempt the servicer from compliance even when the borrower has been making payments on the mortgage for many years after the bankruptcy case has concluded, if the borrower has discharged the mortgage debt. Proposed comments 39(d)(1)-1(ii) and 39(d)(1)(i)-1 more clearly state that compliance with the live contact requirements under § 1024.39(a) is not required if the borrower has discharged the mortgage debt in a bankruptcy case.

As we pointed out in our earlier comments to the IFR, many consumers file chapter 7 bankruptcy cases for reasons unrelated to their mortgages, and do not reaffirm mortgage debts. Many of these consumers continue to make mortgage payments while the bankruptcy is pending, and maintain payments for months and years after receiving a discharge. This practice is supported by the Bankruptcy Code, which discourages reaffirmation of mortgage debt. Section 524(j) of the Code provides that a mortgage creditor may continue to seek and collect periodic payments and other acts in the ordinary course of business without violating the discharge injunction, rather than enforce its in rem rights against the property by foreclosing on the mortgage.[7] Proposed § 1024.39(d)(1)(i)(C), and comments 39(d)(1)-1 and 39(d)(1)(i)-1, are inconsistent with the policy expressed by Congress in Bankruptcy Code § 524(j) that mortgage creditors should treat discharged borrowers in a customary manner when servicing the mortgage post-discharge, which should include efforts to avoid foreclosure through early intervention.

The Bureau has acknowledged the importance of this "ride-through" option for home mortgages and appropriately incorporated it into the proposal for the limitations on the bankruptcy exemption for periodic statements.[8] There is no sound policy reason for treating the early intervention provisions differently.

Thus, we urge the Bureau to further limit the exemption by requiring early intervention with a borrower after a bankruptcy discharge in certain circumstances. For simplicity of administration, we suggest that the early intervention exemption be limited to borrowers who are not entitled to receive periodic statements after a bankruptcy discharge pursuant to proposed Regulation Z § 1026.41. In other words, if the servicer is required to send the borrower periodic statements after a bankruptcy discharge, then the servicer should also attempt live contact and send written notice to the borrower in accordance with § 1024.39(a) and (b) if the loan becomes delinquent.

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[7] *See* 11 U.S.C. *§* 524(j). *See also In re* Hart, 402 B.R. 78 (Bankr. D. Del. 2009) (ride through option of retaining mortgage property while remaining current on payments is permissible because § 521(a)(6) does not apply to real property); *In re* Waller, 394 B.R. 111 (Bankr. D.S.C. 2008) (debtor may retain a home by continuing to make payments and without reaffirming the mortgage debt); *In re* Caraballo, 386 B.R. 398 (Bankr. D. Conn. 2008); *In re* Wilson, 372 B.R. 816 (Bankr. D. S.C. 2007); *In re* Bennett, 2006 WL 1540842 (Bankr. M.D. N.C. May 26, 2006).

[8] *See* Section-by-Section Analysis, 79 Fed. Reg. 74249 (Dec. 15, 2014).

As a technical point, we believe that proposed comment 39(d)(1)-1(i) should be redrafted. The comment states that "with respect to a borrower who has not discharged the mortgage debt," a servicer must resume live contact with a borrower for a delinquency that occurs following certain outcomes in the bankruptcy case, such as the closing of the case or the entry of the discharge order. As drafted, it would potentially exempt a borrower from early intervention even if the borrower entered into a reaffirmation agreement that provided for some partial discharge of the mortgage debt. To avoid this situation (and for consistency purposes), we suggest that the Bureau use the same language that was included in the comparable provision in proposed § 1026.41(e)(5)(ii)(B) of Regulation Z for resuming compliance with the periodic statement requirements. That provision more appropriately uses the phrase: "with respect to any portion of the mortgage debt that is not discharged pursuant to 11 U.S.C. 727, 1141, 1228, or 1328."

D. The early intervention exemption for a borrower in bankruptcy who has sent an FDCPA "cease communication" notice should not be adopted.

Section 1024.39(d)(2) currently exempts servicers subject to the FDCPA for a mortgage loan from the early intervention requirements if the borrower has sent a "cease communication" notification pursuant to FDCPA section 805(c), 15 U.S.C. 1692c(c). We address the Bureau's proposals for revising this exemption more fully in our separate comments dealing with the non-bankruptcy proposals in this docket. However, we comment here on the specific proposal for borrowers in bankruptcy.

Proposed comment 39(d)(2)(iii)-2 provides that a servicer is not required to provide the early intervention written notice if: 1) a borrower has sent a section 805(c) notification under the FDCPA and the FDCPA applies, and 2) the borrower is in bankruptcy and is not represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf. The comment further provides that if the borrower is represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf, the servicer must provide the modified written notice required by § 1024.39(d)(2)(iii) to the borrower's representative.

We support the requirement to provide the written notice to the borrower's representative if the borrower is represented in the bankruptcy case. However, we are concerned that proposed comment 39(a)-5 will significantly undermine compliance with the requirement.[9] Comment 39(a)-5 provides that the Bureau's guidance with respect to communicating with a borrower's representative applies to the written notice provision under § 1024.39(b). Comment 39(a)-5 states:

> Section 1024.39 does not prohibit a servicer from satisfying the requirements § 1024.39 by establishing live contact with and, if applicable, providing information about loss mitigation options to a person authorized by the borrower to communicate with the servicer on the borrower's behalf. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring a person that claims

[9] Proposed comment 39(d)(2)(iii)-2 states at the end: "See comment 39(a)-4." We believe this citation is incorrect and should refer to comment 39(a)-5.

> to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.

A similar guidance with respect to the notice of error and request for information provisions of Regulation X has caused significant problems and unnecessary delays in compliance with those regulations. Servicers often reject a borrower's authorization if it is not prepared on the servicer's form. Some servicers have even required that the borrower's signature be notarized. Borrower authorization forms are often directed to a separate division or different personnel at the servicer, thereby delaying the request. Servicers have ignored the "reasonable procedures" guidance and have put up significant barriers for borrowers in making determinations of a representative's authority.

While we hope that the Bureau will address the general problems with borrower representative authorizations for all of the Regulation X provisions in this or some other docket, we strongly oppose applying proposed comment 39(a)-5 to borrowers in bankruptcy. Servicer concerns about "whether a person that claims to be an agent of a borrower has authority from the borrower" simply do not exist for a borrower represented in a bankruptcy case. If the borrower is represented in the bankruptcy case, the borrower must be represented by a licensed attorney who has entered an appearance in the case and who is a member of the federal bar for the U.S. District Court in which the bankruptcy court is located. The attorney must comply with the ethical standards set out in the District Court's local rules, as well as applicable state ethics rules. All notifications from the bankruptcy court to the servicer clearly identify the borrower's attorney and his or her contact information. If the servicer somehow misplaces these notifications or needs any further verification information, they can easily obtain this information on PACER. Quite simply, proposed comment 39(d)(2)(iii)-2 should be revised to state that if the borrower is represented in the bankruptcy case, the servicer must provide the modified written notice required by § 1024.39(d)(2)(iii) to the borrower's attorney of record.

As for unrepresented borrowers in a bankruptcy case, we oppose the exemption in proposed comment 39(d)(2)(iii)-2. The Bureau is proposing to require that servicers provide written notices to unrepresented borrowers directly when they are not in a bankruptcy case, and we see no reason why an unrepresented debtor should be treated differently given the other requirements (and model clauses) in proposed § 1024.39(d)(2) for dealing with FDCPA cease communication notifications.

In 2008, the Department of Housing and Urban Development (HUD) addressed similar early intervention requirements for borrowers in bankruptcy in Mortgagee Letter 2008-32. HUD specifically requires mortgagees, upon receipt of notice of a bankruptcy filing, to send information to a consumer debtor's attorney about available loss mitigation options. While HUD noted that nothing in the Mortgagee Letter requires a servicer to directly contact a borrower in bankruptcy, HUD recommends in the letter that servicers should send information relating to the availability of loss mitigation directly to an unrepresented (pro se) consumer with a copy to the bankruptcy trustee, and that the communication should indicate it is not an attempt to collect a debt. We believe that the Bureau should consider a similar requirement for unrepresented borrowers in bankruptcy who have previously sent a section 805(c) notification under the FDCPA.

II. The Proposed Exemption from the Periodic Statement Requirements for Certain Consumers in Bankruptcy. [Section 1026.41(e)(5)]

We agree with the Bureau that "a consumer's status in bankruptcy" should not "act as a bar to receiving fundamental information about the mortgage loan account."[10] We are also pleased that in revising the bankruptcy exemption to the periodic statement requirements, the Bureau considered documented concerns about servicers not properly applying payments in chapter 13 cases. The Bureau should be applauded for devising a limited exemption that preserves the ability of bankruptcy borrowers to receive essential account information. Our comments largely address how the Bureau can improve the proposed rule.

A. Proposed § 1026.41(e)(5)(i)(A) appropriately limits the exemption with respect to co-obligors.

At least two conditions must be satisfied, drawn from factors listed in two separate categories, before the exemption in proposed § 1026.41(e)(5)(i) may apply. In the first category, which addresses the consumer's bankruptcy status, the consumer must: 1) be a debtor in a bankruptcy case, 2) be a primary obligor on a mortgage loan for which another primary obligor is a debtor in a chapter 12 or chapter 13 case, or 3) have discharged personal liability for the mortgage loan through bankruptcy. This effectively limits the first category of conditions to consumers who are subject to the automatic stay or discharge injunction.

This approach is consistent with the proposed exemption for the early intervention requirements. It properly recognizes that a co-obligor who has not joined in another co-obligor's chapter 7 bankruptcy case should not be exempt from receiving periodic statements, because the automatic stay is not applicable to the non-filing co-obligor. We also believe the proposed comment § 41(e)(5)(i)-1 on joint obligors is helpful, though it should be expanded to provide an example in the chapter 13 context, as discussed below.

B. The default "opt-out" condition in proposed § 1026.41(e)(5)(i)(b) is appropriate and should be included in the final rule.

At least one of the conditions in the second category (proposed § 1026.41(e)(5)(i)(B)) must also apply before the servicer is exempt from the periodic statement requirements. The first condition in this second category refers to a consumer's notice to the servicer.

As participants in the roundtable conducted by the Bureau on the IFR, we stressed that if any condition for receipt of periodic statements is based on a consumer's need to notify the servicer, the default position in the rule should be that the consumer will continue to receive statements unless the consumer affirmatively "opts out" by providing written notice to the servicer. We expressed concern that consumers might not become aware of an "opt-in" requirement and might not exercise such a right despite a desire to receive statements, particularly at a time when the consumer is burdened with the numerous filing requirements in a

[10] *See* Section-by-Section Analysis, 79 Fed. Reg. 74249 (Dec. 15, 2014).

bankruptcy case. Thus we commend the Bureau for adopting the "opt-out" approach in proposed § 1026.41(e)(5)(i)(B), which provides as one of the possible conditions that the "consumer requests in writing that the servicer cease providing periodic statements or coupon books."

C. The other conditions in proposed § 1026.41(e)(5)(i)(b) correctly attempt to limit the exemption to consumers in bankruptcy who are not seeking to retain their homes, but the Bureau should further limit the exemption and provide additional clarification.

In our earlier comments to the IFR, we opposed the current exemption in § 1026.41(e)(5) because it does not distinguish between consumers who intend to retain their homes (and continue making payments) and those consumers who intend to surrender their homes. We support the current proposal because it limits the exemption by drawing a distinction between these two groups of consumers.

The proposed exemption accomplishes this goal by establishing conditions that reflect a consumer's intent to no longer retain the home or provide payment of the mortgage loan. We support these conditions as set out in proposed § 1026.41(e)(5)(i)(B):

- the consumer's confirmed plan provides for surrender of the property securing the mortgage loan, provides for avoidance of the lien securing the mortgage loan, or otherwise does not provide for payment of prebankruptcy arrearages or the maintenance of payments due under the mortgage loan;
- an order is entered in the consumer's bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay with respect to the property, or requiring the servicer to cease providing periodic statements or coupon books; or
- the consumer files in the bankruptcy case a Statement of Intention indicating an intent to surrender the property.

At the workshop conducted on the IFR, we suggested that the conditions for triggering the exemption should not apply if the consumer has submitted a loss mitigation application that is under review by the servicer. Even though the consumer may file a Statement of Intention indicating surrender of the property, the consumer may have submitted a loss mitigation application before filing bankruptcy that is still being reviewed by the servicer. The consumer might also have a confirmed chapter 13 plan that provides for payment of the mortgage based on a trial plan payment rather than "maintenance of payments due under the mortgage loan," at least until the trial modification is made permanent. Some bankruptcy courts will confirm a plan based on trial plan payments, subject to modification of the plan, if necessary, once there is a permanent modification.[11] It does not make sense to stop sending periodic statements to

[11] *E.g.*, *In re* Garcia, 2014 WL 3970175 (S.D. Fla. Jan 6, 2014) (discussing application of court's Mortgage Modification Mediation Program requirement that debtor make payments of no less than 31% of gross monthly income to mortgage creditor pending offer of trial or permanent loan modification; Court's program requires debtors to include in their chapter 13 plans the following provision: "If a settlement is reached after the plan is confirmed, the debtor will file a motion to modify the plan no later than 30 calendar days following approval of the settlement

consumers when they are being reviewed for a loss mitigation option or when they are performing on a trial plan. Denying consumers the right to receive statements under these circumstances is also inconsistent with the policy prohibiting dual tracking. We urge the Bureau to reconsider its rejection of this suggestion.[12]

Proposed comment 41(e)(5)(i)-1 provides a helpful example of how the conditions in this second category (proposed § 1026.41(e)(5)(i)(B)) interact with the conditions in the first category (proposed § 1026.41(e)(5)(i)(A)) when there are joint obligors on the mortgage loan. The example in the comment is based on the filing of a Statement of Intention in a chapter 7 case.

By referring solely to "the consumer" in proposed § 1026.41(e)(5)(i)(B)(2), and not to "another primary obligor," we construe the condition in that subsection as applying only to the consumer who has filed a chapter 13 case, and not to any co-obligor on the loan who has not joined in the consumer's chapter 13 case. In that situation, the co-obligor who has not filed a chapter 13 case will continue to receive periodic statements even where the consumer's confirmed plan provides for surrender of the property securing the mortgage loan, provides for avoidance of the lien securing the mortgage loan, or otherwise does not provide for payment of prebankruptcy arrearages or the maintenance of payments due under the mortgage loan. We support this position, but believe that without further clarification, servicers may misapply the proposed exemption. To avoid any ambiguity concerning whether a servicer must continue to provide statements or coupon books to a non-filing joint obligor when an exemption under § 1026.41(e)(5)(i) applies to one of the obligors based on a chapter 13 filing, we urge the Bureau to expand and modify proposed comment § 41(e)(5)(i)-1 as follows:

41(e)(5)(i) Exemption.

1. Multiple obligors. When two or more consumers are primarily liable on a mortgage loan, an exemption under § 1026.41(e)(5)(i) with respect to one of the primary obligors does not affect the servicer's obligations to comply with § 1026.41 with respect to the other primary obligors. For example~~,~~:

i. Assume ~~assume~~ that two spouses jointly own a home and are both liable on the note, and one of the spouses files Chapter 7 bankruptcy. That spouse files a Statement of Intention in the bankruptcy case identifying an intent to surrender the home. The servicer is exempt under § 1026.41(e)(i) from providing periodic statements with respect to the spouse in bankruptcy, but the servicer is required to comply with § 1026.41 with respect to the other spouse. As a result, the other spouse would continue to receive regular periodic statements, which would not include any of the modifications set forth in § 1026.41(f).

ii. Assume the same example, except that ~~On the other hand, if~~ the spouse in bankruptcy had instead filed a Statement of Intention identifying an intent to

by the Court and the Lender shall have leave to amend its Proof of Claim to reflect the settlement reached after confirmation of the plan.").

[12] *See* Section-by-Section Analysis, 79 Fed. Reg. 74253 (Dec. 15, 2014).

retain the property and reaffirm the mortgage loan. ~~, the~~ The servicer would not be exempt under § 1026.41(e)(i) with respect to that spouse. In that case, the servicer would have to provide periodic statements with the modifications required under § 1026.41(f)(1) and (2). As comment 41(f)(4)-1 explains, the servicer could provide a periodic statement with the modifications set forth in § 1026.41(f)(1) and (2) to either of the two spouses, even though only one of the spouses is in bankruptcy.

iii. Assume that two spouses jointly own a home and are both liable on the note, and one of the spouses files Chapter 13 bankruptcy. That spouse's Chapter 13 plan, which is confirmed by the court, provides for maintenance of payments due under the mortgage loan. The servicer would not be exempt under § 1026.41(e)(i) with respect to that spouse. As in the above example, the servicer could provide a periodic statement with the modifications set forth in § 1026.41(f)(1) and (2) to either of the two spouses, even though only one of the spouses is in bankruptcy.

iv. Assume the same example, except that the confirmed plan of the spouse in the Chapter 13 case provides for surrender of the home. The servicer is exempt under § 1026.41(e)(i) from providing periodic statements with respect to the spouse in the Chapter 13 bankruptcy, but the servicer is required to comply with § 1026.41 with respect to the other spouse. As a result, the other spouse would continue to receive regular periodic statements, which would not include any of the modifications set forth in § 1026.41(f).

D. Proposed comments 41(e)(5)(i)-2 and 41(e)(5)(i)(B)(4)-1 are helpful.

We support proposed comment 41(e)(5)(i)-2, which clarifies for purposes of § 1026.41(e)(5), that the term "plan of reorganization" refers to a consumer's confirmed plan under one of the reorganization chapters of the Bankruptcy Code. Consumer debtors often amend their plans before confirmation. For example, a debtor who initially files a plan proposing to surrender the home may have a change in circumstances before plan confirmation (such as getting a better job or a loan modification), and may then file an amended plan seeking to retain the home. If the basis for the exemption is a plan provision providing for the surrender of the property or avoidance of the mortgage lien, the exemption should apply based upon the actual confirmed plan, upon entry of the confirmation order by the court. Thus, periodic statements should continue in the pre-confirmation period, unless the consumer sends a written notice requesting that the servicer cease providing statements, or one of the other conditions in proposed § 1026.41(e)(5)(i)(B) not relating to a reorganization plan is satisfied.

Similarly, we support proposed comment 41(e)(5)(i)(B)(4)-1, which clarifies that if the exemption under § 1026.41(e)(5)(i) applies based on a consumer's Statement of Intention indicating an intent to surrender the property, a servicer must rely on a consumer's most recently filed Statement of Intention. Again, this appropriately requires the servicer to consider the most current, actual events in the consumer's bankruptcy case.

E. Consumers who would otherwise be subject to the bankruptcy exemption should have the unconditional right to "opt-in" to receiving periodic statements.

The Bureau has correctly recognized that events in a consumer bankruptcy case are fluid and that the positions of the consumer and mortgage creditor with respect to a mortgage loan may change significantly during the bankruptcy and after the case is closed. For example, the consumer may file a Statement of Intention indicating that the home will be surrendered, but then later enter into a loan modification with the mortgage holder. It is not uncommon for a consumer to be provided a home retention loss mitigation option even after the creditor has obtained stay relief in the consumer's bankruptcy case. Critically in these situations, the consumer should not be a permanently barred from receiving periodic statements.

Proposed § 1026.41(e)(5)(ii)(A) addresses this issue by providing that a servicer is not exempt from the requirements of § 1024.41 with respect to a consumer who submits a written request to continue receiving periodic statements or coupon books, unless a court enters an order requiring otherwise. We strongly support this provision as an essential component of the exemption scheme. A consumer who would otherwise be subject to the exemption should always have the unconditional right to "opt-in" to receiving periodic statements.

The Bureau requests comment on how consumers in bankruptcy may be made aware of their ability to opt-in or opt-out of receiving periodic statements, whether such requests must be made in writing, whether oral requests should be sufficient, and whether servicers should be able to designate an exclusive mailing address for receiving written requests. We believe that if a servicer determines that the exemption in proposed § 1026.41(e)(5) applies, the servicer should be required to send a written notice to the consumer indicating that periodic statements will no longer be provided, the basis for the exemption, and the consumer's right to request to continue receiving periodic statements or coupon books pursuant to proposed § 1026.41(e)(5)(ii)(A). We prefer that oral requests should be permitted. However, if the Bureau retains the written request requirement, it should provide in the regulation or a comment that servicers must notify consumers who make an oral request of the need to submit a written request.

We strongly oppose any proposal that would require consumers to use an exclusive address designated by the servicer for receiving written requests. A similar requirement for notices of error and requests for information under RESPA has caused huge problems for consumers and is used as a "gotcha" by servicers to avoid compliance (as well as liability in litigation). It is often a struggle to find these RESPA exclusive addresses on servicers' websites, as they are often buried many pages in from the website's homepage and often are not properly designated as the exclusive address.

III. Modified Periodic Statements and Coupon Books for Certain Consumers in Bankruptcy. [Section 1026.41(f)]

We concur with the Bureau's determination that consumers who are in a bankruptcy case or who have discharged a mortgage debt should receive modified periodic statements. Particularly for consumers in a chapter 13 case, this provides an opportunity for consumers to receive statements containing account information tailored to their circumstances, which will assist them in completing their chapter 13 plans. However, several of the proposed exclusions of information in the modified statements will be harmful to consumers.

A. The exclusions in proposed § 1026.41(f)(1) will deprive consumers of critical account information.

Current § 1026.41(d)(1)(ii) requires a periodic statement to include in the "amount due" section the amount of any late fee and the date on which the fee will be imposed if payment has not been received. Proposed § 1026.41(f)(1) provides that servicers may exclude these late fee disclosures from statements provided to certain consumers. While it may be appropriate to permit the omission of this information for statements to consumers who are debtors in a chapter 13 case, because some servicers do not charge late fees for payments disbursed by chapter 13 trustees, the exclusion should not apply when a bankruptcy case is no longer pending. If consumers who have discharged their mortgage debts in bankruptcy will be charged a fee for late payments, they should be notified of the amount of the fee and importantly the information they need to avoid the late fee (the date on which the fee will be imposed if no payment is made). Providing this basic information in itself, combined with the required general disclosure that the statement is for informational purposes only, does not violate the discharge injunction. It is fundamentally no different than a servicer providing information about other contractual terms related to payments, such as payment adjustment notices on a variable rate mortgage.

Proposed § 1026.41(f)(1) provides that servicers may exclude the disclosures set forth in § 1026.41(d)(8)(i), (ii), and (v) from the modified statements. These disclosures include: the date on which the consumer became delinquent; a notification of possible risks, such as foreclosure and expenses, that may be incurred if the delinquency is not cured; and a notice of whether the servicer has made the first notice or filing for any judicial or non-judicial foreclosure process.

We appreciate that the Bureau did not exclude all delinquency information from the modified statements. The delinquency information that has been retained is valuable to all consumers, even those who have discharged their mortgage debts in a bankruptcy case. We urge the Bureau to retain this information in the final modified statements.

Exclusion of the disclosures set forth in § 1026.41(d)(8)(i), (ii), and (v) may be appropriate for consumers who are in a pending bankruptcy case. But there is no sound reason to exclude this helpful information about the potential loss of the consumer's home at foreclosure from statements provided to consumers who have discharged their mortgage debts in bankruptcy. To the extent there are any debt collection concerns in relation to the excluded information, they would be relevant during a bankruptcy case when the automatic stay is in effect. We are not aware of a single decision in which a court has imposed sanctions for violation of the discharge injunction on a servicer in a “ride-through” situation in which the consumer is making payments on the loan, for simply providing the consumer with information about the servicer’s attempt to enforce its in rem rights under the mortgage lien. The few cases in which sanctions have been imposed on servicers were an appropriate response to egregious servicer actions that either involved an overt attempt to collect the debt as a personal obligation of the consumer or followed the consumer’s unambiguous request not to receive such statements.[13] As we stated in our comments to the IFR, servicing policy should not be dictated by court responses to the atypical practices of a few bad actors.

Moreover, consumers who will be receiving periodic statements after their mortgage debts were discharged in bankruptcy have either filed a Statement of Intention indicating that they wish to retain their home in a “ride-through” situation or they will have provided an affirmative request to receive statements under proposed § 1026.41(e)(5)(ii)(A). This express consent from the consumer will further insulate servicers from any possible threat of discharge injunction violations.

Although we think it is unnecessary, we are not opposed to the proposal that would excuse servicers from the requirement in § 1026.41(d)(1)(iii) to show the amount due more prominently that other disclosures on the modified statements.

B. The exclusions and modifications in proposed § 1026.41(f)(3) for consumers in chapter 12 and chapter 13 cases need further refinement.

1. Exclusion of delinquency information

Proposed § 1026.41(f)(3)(i) provides that servicers may exclude all of the remaining delinquency information disclosures (in addition to § 1026.41(d)(8)(i), (ii), and (v)) set forth in § 1026.41(d)(8) from the modified statements sent to a consumer who is a debtor in a chapter 12 or chapter 13 case. We oppose this broad exemption and continue to believe that there should be some limited delinquency information provided to consumers in a chapter 12 or chapter 13 case.

If the consumer’s confirmed plan provides for maintenance of payments on the mortgage, and the servicer contends that the consumer has failed to maintain these post-petition payments, the servicer should be required to disclose on the modified statement the date on which the consumer became delinquent, which is currently required by § 1026.41(d)(8)(i). We also believe that the servicer should provide in this situation an account history in the manner required by § 1026.41(d)(8)(iii). We do not oppose exclusion of the other required delinquency information disclosures in § 1026.41(d)(8) from modified statements sent to a consumer who is a debtor in a chapter 12 or chapter 13 case.

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[13] *In re* Culpepper, 481 B.R. 650 (Bankr. D. Or. 2012) (repeated unwanted calls about mortgage debt violated discharge injunction); Brown v. Bank of Am. (*In re* Brown), 481 B.R. 351 (Bankr. W.D. Pa. 2012) (where debtor had not made any mortgage payments for several years before and after filing bankruptcy, had permitted stay relief to be granted to the mortgage creditor, had never indicated any intent to retain her home, informational notices and foreclosure related acts did not violate discharge injunction, but sending statements seeking payments due well after discharge entered without any disclaimer that they were not attempts to collect debt did violate the discharge).

In the past, consumer debtors and their attorneys would know when their servicers claimed they were delinquent, because servicers would promptly file motions for relief from the automatic stay or they would request that the chapter 13 trustee file a motion to dismiss. For reasons that are not entirely clear, perhaps relating to servicers' difficulties in complying with the stay relief documentation requirements in the National Mortgage Settlement and related consent orders, recently some mortgage servicers will permit consumers to remain delinquent for months and even years during the pendency of chapter 13 cases without seeking stay relief or otherwise notifying debtors, their attorneys, or chapter 13 trustees.[14] This is a serious problem that should be addressed in the periodic statement rule. Consumers in a chapter 13 case should be promptly notified when their servicer believes they are delinquent with post-petition mortgage payments, so that they can take action to rectify the problem before they either become hopelessly behind or it becomes too late for them to feasibly modify their plan. If they are not truly delinquent, perhaps because the servicer has misapplied payments, the notification in the statement will prompt consumers to seek correction of the account error.

2. Disclosures for the amount due and explanation of amount due

Proposed § 1026.41(f)(3)(ii) and (iii) modify the requirements of § 1026.41(d)(1) and (2) for statements provided to consumers in chapter 12 or chapter 13 cases. The disclosures for the amount due and explanation of amount due may be limited to the monthly post-petition payments due and any post-petition fees or charges imposed since the last periodic statement. Proposed comments 41(f)(3)(ii)-1 and (iii)-1 clarify that these disclosures would not include any payments due for a debtor's pre-petition arrearages. We support these changes.

In particular, we strongly support the Bureau's decision to require the explanation of post-petition amount due, which would include a breakdown of how much of the post-petition payment is applied to principal, interest, and escrow. This is information that is currently required under § 1026.41(d)(2)(i). Several mortgage industry trade groups oppose disclosure of this information, suggesting that servicers would not be able to comply because post-petition payments must be applied to the oldest outstanding unpaid periodic payment. This appalling misunderstanding of bankruptcy law confirms why disclosure is needed. Once the debtor's chapter 13 plan is confirmed in a case involving a mortgage being treated under 11 U.S.C.§ 1322(b)(5), servicers are required under bankruptcy law to apply the debtor's ongoing post-petition mortgage payments from the petition date as if no pre-petition default exists based on the mortgage contract terms and the original loan amortization.[15] Post-petition payments must not be applied to the oldest outstanding unpaid periodic payment due from the pre-petition period.[16]

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[14] *See, e.g.*, *In re* Heinzle, 511 B.R. 69 (Bankr. W.D. Tex. May 30, 2014) (in its response to the Trustee's Notice of Final Cure Payment filed at the conclusion of the chapter 13 case, servicer indicated that it agreed with the Trustee's statement that the debtors had paid the full amount required to cure the default, but stated that the debtors were delinquent in the amount of $33,467.35 for roughly thirty post-petition mortgage payments).

[15] See Rake v. Wade, 508 U.S. 464, 473 (1993) (noting that as authorized by §1322(b)(5), mortgage creditor's claim is effectively "split...into two separate claims--the underlying debt and the arrearages"); *In re* Wines, 239 B.R. 703 (Bankr. D. N.J. 1999); *In re* Rathe, 114 B.R. 253 (Bankr. D. Idaho 1990).

[16] *See, e.g*, *In re* Boday, 397 B.R. 846 (Bankr. N.D. Ohio 2008) (creditor violated plan confirmation order and discharge order by failing to apply portions of debtor's ongoing postpetition payments to reduce principal balance as if loan were not in default); *In re* Hudak, 2008 WL 4850196, at *5 (Bankr. D. Colo. Oct. 24, 2008) (Bankruptcy

The disclosures under § 1026.41(d)(1) and (2) will enable debtors, their attorneys and chapter 13 trustees to detect when servicers fail to properly apply payments in accordance with bankruptcy law and the underlying mortgage contract.

3. Disclosure of past payment breakdown

Proposed § 1026.41(f)(3)(iv) requires disclosure of 1) the total of all post-petition payments received since the last statement and a breakdown of the amounts applied to principal, interest, and escrow, 2) the amount, if any, currently held in any suspense or unapplied funds account, and 3) a total of all payments applied to post-petition fees or charges since the last statement. Proposed § 1026.41(f)(3)(iv) also requires the periodic statement to include the total of all post-petition payments received since the beginning of the calendar year and a similar breakdown of the amounts applied to principal, interest, and escrow, currently held in any suspense or unapplied funds account, and applied to post-petitions fees or charges since the beginning of the calendar year.

For the reasons previously stated, we strongly support this proposal. This is critical information that will help consumers, their attorneys and trustees identify payment application errors.

The Bureau notes that it intends to conduct consumer testing on a proposed sample statement for chapter 13 consumers to determine whether consumers are in fact confused by any discrepancy between the allocation in the amount due and the allocation in the past payment breakdown. While we do not oppose this testing, we hope that the Bureau will appreciate that the value of this disclosure is not limited to consumers. In fact, most consumers are represented by attorneys in chapter 13 cases, and the disclosure of this information will greatly assist these attorneys (and chapter 13 trustees) if a payment application problem arises.

4. Disclosure of transaction activity

Requiring disclosure of the transaction activity that causes credits or debits to the amount due on a consumer's mortgage account, including any fees or charges that have been assessed, is an essential component of the periodic statement rule in the 2013 TILA Servicing Final Rule. It helps consumers to understand and track transactions on their account, and provides them with information that can help them avoid delinquency. We believe that consumers in a chapter 13 bankruptcy receive the same benefits from having this information as consumers outside bankruptcy.

During the bankruptcy roundtable that the Bureau held on June 16, 2014, we commented that the transaction activity should include both payments for pre-petition arrears and payments

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Code, not language of deed of trust determines how ongoing payments will be applied while debtor cures default in chapter 13); *In re* Myles, 395 B.R. 599 (Bankr. M.D. La. 2008) (creditor improperly treated postpetition payments as if loan in default); *In re* Payne, 387 B.R. 614 (Bankr. D. Kan. 2008) (imposing sanctions upon servicer who improperly created a postpetition escrow arrearage by applying debtors' payments to prepetition debt rather than to the currently due monthly installments); *In re* Collins, 2007 WL 2116416 (Bankr. E.D. Tenn. July 19, 2007) (upon plan confirmation, creditor must update accounting system so that postpetition maintenance of payment installments are treated as contractually current).

for post-petition amounts due that are received by the servicer, irrespective of whether they are disbursed to the servicer by the consumer directly or by the trustee. We stated that disclosure of all payments received by the servicer is essential, so that consumers (and their attorneys and the trustee) may have a complete record of the transaction activity. However, we also noted that it is not as important for the transaction activity disclosure to identify the source of payments - that is, whether the payments have come from the trustee or the consumer. We continue to support these positions, and appreciate that the Bureau incorporated them in proposing the modified statement requirements.

Proposed § 1026.41(f)(3)(v) provides that the transaction activity information required to be disclosed on a periodic statement under § 1026.41(d)(4) must include any post-petition payments, pre-petition payments, and payments of post-petition fees or charges the servicer has received since the last statement. We commend the Bureau for requiring disclosure of the transaction activity, including payments for pre-petition arrears and post-petition fees or charges.

5. Disclosure of pre-petition arrearage

Most consumers who file a chapter 13 case are proposing in their plans to cure a pre-petition mortgage default. We believe that disclosure of the pre-petition arrearage amount on periodic statements will help consumers understand how their chapter 13 plans are working. It will encourage them to complete their plans as they see the arrearage amount being reduced over time.

Our position at the bankruptcy roundtable was that disclosure of the pre-petition arrearage is essential, including disclosure of a running balance as payments are made. However, we did not believe that it would be necessary for servicers to disclose how payments on the arrearage are allocated as between principal, interest, escrow and other charges.

Consistent with our earlier comments, we support proposed § 1026.41(f)(3)(vi). It requires a servicer to disclose, if applicable, the total of all pre-petition payments[17] received by the servicer since the last periodic statement, the total of all pre-petition payments received by the servicer since the beginning of the current calendar year, and the current balance of the consumer's pre-petition arrearage. We also support proposed § 1026.41(f)(5) dealing with consumers who receive coupon books rather than periodic statements, which requires servicers to make available upon request by the consumer the pre-petition arrearage information listed in proposed § 1026.41(f)(3)(vi).

6. Additional disclosures

In our comments to the IFR and at the bankruptcy roundtable, we suggested that periodic statements could include some additional disclosures and disclaimers that are consistent with the payment considerations of a consumer in a chapter 13 case. These disclosures would help

[17] We support proposed comment 41(f)(3)-2, as it helps to clarify for purposes of § 1026.41(f)(3) that "pre-petition payments" are payments made under a plan to cure the consumer's pre-bankruptcy defaults, and that "post-petition payments" are payments made under a plan of reorganization to satisfy the mortgage loan's periodic payments as they come due after the bankruptcy case is filed.

consumers understand how the information on the periodic statement interacts with their bankruptcy plans. Thus, we support the four additional statements that servicers are required to include on the periodic statement under proposed § 1026.41(f)(3)(vii), if applicable:

- a statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan;
- a statement that, if the consumer's plan of reorganization requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, the consumer should send the payment to the trustee and not to the servicer;
- a statement that the information disclosed on the periodic statement may not reflect payments the consumer has made to the trustee and may not be consistent with the trustee's records; and
- a statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments.