February 15, 2018

Acting Director John Michael Mulvaney
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: Bankruptcy Statement Final Rule Amendments to the 2013 Mortgage Rules

Dear Acting Director Mulvaney:

This letter sent by the National Consumer Law Center (NCLC),[1] on behalf of its low-income clients, and the National Association of Consumer Bankruptcy Attorneys (NACBA)[2] responds to the Consumer Mortgage Coalition (CMC) request that the Consumer Financial Protection Bureau's final rule on bankruptcy periodic statements be repealed, delayed, or clarified, in letters dated January 25, 2018 and February 7, 2018.

Periodic mortgage statements provide consumers with important information about their mortgage accounts that can help them understand their payment obligations and avoid default. Before the foreclosure crisis, servicers often did not provide periodic statements to consumers with subprime mortgages, leaving these consumers in the dark about steps they might take to avoid foreclosure. Congress responded by requiring that periodic statements be given to consumers on residential mortgages, including helpful disclosures for borrowers who are in default.[3] Although Congress granted an exemption for servicers who provide similar

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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 Consumer Bankruptcy Law and Practice, Mortgage Lending, Truth in Lending, and Foreclosures and Mortgage Servicing.

[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 has approximately 2,500 members located in all 50 states and Puerto Rico.

[3] 15 U.S.C. § 1638(f).

information in coupon books rather than statements, Congress saw no reason to exempt consumers who are paying their mortgages while in bankruptcy.

The Bureau implemented the periodic statement requirement as part of the 2013 Mortgage Servicing Final Rules, and initially granted an exemption only to certain small servicers. However, in October 2013, the Bureau issued an Interim Final Rule (IFR) that "provisionally suspended" the periodic statement requirements in the 2013 Mortgage Servicing Final Rules with respect to consumers in bankruptcy.[4] The IFR was to remain in effect until the Bureau could issue a final rule that would more precisely delineate the scope of the bankruptcy exemption.

The Bureau issued a proposed final rule on the bankruptcy statement exemption after long and careful analysis, following extensive outreach and consultation with members of the mortgage industry and bankruptcy community. The Bureau consulted with representatives of the servicing industry, Chapter 13 trustees, the United States Trustee's Program, and consumer organizations. Input from bankruptcy judges was also obtained. A roundtable discussion was hosted by the Bureau on June 16, 2014 in which consensus by the various stakeholders was reached on a number of issues. The Bureau also conducted consumer testing of proposed bankruptcy statements, which validated the critical importance of statements for consumers who wish to continue making mortgage payments during and after bankruptcy.

This deliberative and inclusive process extending over a five-year period led to a final rule that creates a balanced and much improved bankruptcy exemption to the periodic statement rule. The final rule provides clarity on when statements can be provided to consumers during and after a bankruptcy case. It also provides clear guidance on how statements may be modified to address the specific circumstances in bankruptcy, thereby eliminating the uncertainty that existed both before there was a periodic statement rule and under the current bankruptcy exemption.

The CMC's letter inaccurately describes the impact of the final rule and departs significantly from the positions taken by a number of mortgage industry stakeholders and the United States Trustee Program in the extensive rule making process. **We urge you to reject the CMC's request to abandon the final rule or delay its effective date, promptly finalize the proposed rule relating to the timing for servicers to transition to providing modified or unmodified periodic statements, and allow the full rule as written to take effect as already scheduled on April 19, 2018.**

1. **The Bureau's final rule does not conflict with bankruptcy law.**

The CMC contends that the Bureau's final rule will "unnecessarily conflict with well-settled bankruptcy law prohibiting a creditor from collecting debt against consumers who are in an active bankruptcy case or who have previously been discharged from personal liability in a prior bankruptcy case." To support this view, the CMC refers to several bankruptcy court

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[4] Section-by-Section Analysis, § 1026.41(e)(5)(i), 81 Fed. Reg. 72162 (Oct. 19, 2016); *see also* 78 Fed. Reg. 62,993 (Oct. 23, 2013).

decisions that have held that the sending of account statements can violate the bankruptcy automatic stay and discharge injunction.[5] What the CMC fails to state is that in each of these cases, the Bureau's final rule would not have required that statements be provided. In fact, if the Bureau's final rule had been in effect and followed by the servicers in these cases, the servicers would have avoided litigation and liability.

Contrary to the CMC letter, the court decisions cited by the CMC actually support the Bureau's final rule and demonstrate that it is fully consistent with bankruptcy law, as summarized here:

- ***In re* Thomas, 554 B.R. 512, 515 (Bankr. M.D. Ala. 2016).** The consumers filed a Chapter 7 bankruptcy case, listing their home mortgage as a debt. The mortgage servicer filed a motion for relief from the automatic stay, which was granted by the court. The consumers received a Chapter 7 discharge without reaffirming their mortgage debt. While the case was pending, the servicer sent informational mortgage statements to the consumers. After the case was closed, a transferee servicer sent additional billing statements and made collections calls to the consumers.

  If the Bureau's final rule had been in effect, both servicers would have been exempt from sending statements both during and after the bankruptcy case, because 1) the consumers were in an active bankruptcy case and had discharged their personal liability on the mortgage loan in a bankruptcy case;[6] and 2) the court had entered an order providing for the lifting of the automatic stay with regard to the property.[7]

  Even though statements would not have been required under the Bureau's final rule, the CMC letter failed to mention that the court actually held that the monthly mortgage statements sent to the consumers did not violate the automatic stay. In fact, the court found that the statements "provide a helpful itemization of the original principal balance, unpaid principal balance, the escrow balance, and the interest rate."[8]

- ***In re* Sharak, 571 B.R. 13 (Bankr. N.D.N.Y. 2017).** The consumer in this Chapter 13 case did not oppose a stay relief motion filed by the servicer on his home mortgage. After stay relief was granted, the consumer's amended Chapter 13 plan was confirmed providing for the surrender of the home. The consumer completed his plan and a discharge order was entered. Numerous mortgage statements were then sent to the consumer demanding payment of the discharged debt.

  The servicer would have been exempt from sending periodic statements at the time they were sent under multiple prongs of the Bureau's final rule, because 1) the consumer had discharged personal liability on the mortgage loan in a bankruptcy case;[9] 2) the

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[5] *See* notes 2 and 3 of CMC's January 25, 2018 letter.
[6] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(A) (effective April 19, 2018).
[7] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(B) (effective April 19, 2018).
[8] *In re* Thomas, 554 B.R. 512, 520–21 (Bankr. M.D. Ala. 2016).
[9] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(A) (effective April 19, 2018).

consumer's most recent chapter 13 plan provided for the surrender of the property; and 3) the court had entered an order providing for the lifting of the automatic stay with regard to the property.[10]

- ***In re* Vanamann, 561 B.R. 106, 109 (Bankr. D. Nev. 2016).** Unable to maintain payments on her home mortgage after a loss of income, the consumer voluntarily converted her Chapter 13 proceeding to Chapter 7. An order terminating the automatic stay on the property was then entered. Long after the discharge order entered and the consumer had vacated the property (and even after the property had been sold), a transferee servicer continued to send numerous billing statements to the consumer.

  Once again, the servicer would have been exempt from sending periodic statements at the time they were sent under the Bureau's final rule, because 1) the consumer had discharged personal liability on the mortgage loan in a bankruptcy case;[11] and 2) the court had entered an order providing for the lifting of the automatic stay with regard to the property.[12]

- ***In re* Tucker, 2013 WL 3155419 (Bankr. S.D. Ga. June 20, 2013).** The consumer's confirmed Chapter 13 plan provided for the strip down of the creditor's secured claim on a mobile home. The consumer successfully completed payments under her plan, satisfying the creditor's secured claim. After the consumer received her discharge and the bankruptcy case was closed, the consumer's attorney sent a letter to the creditor informing it of the debtor's bankruptcy discharge and warning that attempts to collect the debt would violate the discharge injunction. The creditor nevertheless continued to send billing statements, asserting that there were past due payments and a total amount due.

  The creditor would have been exempt from sending periodic statements at the time they were sent under the Bureau's final rule, because 1) the consumer had discharged personal liability on the mortgage loan in a bankruptcy case;[13] 2) the consumer's Chapter 13 plan did not provide for the curing of a mortgage default or maintenance of payments under the mortgage loan, and 3) the consumer requested in writing that the servicer stop sending statements.[14]

- ***In re* Mickens, 229 B.R. 114 (Bankr. W.D. Va. 1999).** The consumer filed a Chapter 7 bankruptcy case, listing a note held by a credit union as a debt. The note was also signed by a nondebtor co-obligor. After the consumer received his discharge, the credit union began collection against the co-obligor. To resolve the collection action, the co-obligor and the consumer debtor eventually signed a new promissory note with the credit union.

  It is unclear why CMC cited this case since it does not deal with a home mortgage or

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[10] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(B) (effective April 19, 2018).
[11] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(A) (effective April 19, 2018).
[12] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(B) (effective April 19, 2018).
[13] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(A) (effective April 19, 2018).
[14] Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i)(B) (effective April 19, 2018).

periodic statements. The issue was whether the consumer debtor had been coerced into entering into a new obligation in violation of the discharge injunction. If the case involved a mortgage, the credit union would have been exempt from sending statements to both the consumer debtor and the co-obligor, because the consumer had discharged personal liability on the mortgage loan in a bankruptcy case.[15]

To further illustrate that the final rule is not inconsistent with bankruptcy law, many bankruptcy courts have adopted local rules or forms that permit or require periodic statements to be provided to debtors in Chapter 13 cases. These courts recognize the importance of debtors being informed of essential mortgage payment information during bankruptcy. The local rules also clarify that servicers do not violate the automatic stay by providing periodic statements.

The comments we submitted in 2013 to the Bureau gave examples of local rules, standing orders and local forms on mortgage statements from thirty (30) bankruptcy courts in various judicial districts.[16] The Bureau referred to these local rules when it issued the final rule.[17] It is significant that these local rules do not specify the content of periodic statements, leaving that to be determined by applicable nonbankruptcy law.

The Bureau's final rule in this docket has also been supported by the National Association of Chapter 13 Trustees (NACTT) and the United States Trustee Program (USTP). In its comments submitted to the Bureau in this docket about the proposed final rule, the USTP stated: "The Bureau has taken the proper approach. As the Bureau recognizes, borrowers in bankruptcy often have at least as much need for loss mitigation options and accurate information about their loans as other borrowers."[18] The suggestions made by the USTP for improving the final rule were mostly adopted in the final rule, and did not involve issues being raised now by the CMC.

This widespread support from the bankruptcy community for the Bureau's final rule further erodes the CMC's contention the Bureau's actions are somehow out of the mainstream and inconsistent with bankruptcy law.

2. The Bureau's final rule advances the consumer protection purposes of the Bankruptcy Code and the Truth in Lending Act.

The CMC states that the "CFPB's proposed rules are contrary to [the Bankruptcy Code's] strong public policy of protecting bankruptcy debtors...." As a trade association for the

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[15] The bankruptcy exemption under the Bureau's final rule applies at the loan level. If there are joint obligors on the loan, the exemption will apply if any one of the consumers on the loan satisfies the criteria for the exemption. *See* Official Interpretations to Reg. Z, ¶ 41(e)(5)(i)-1(effective April 19, 2018) .

[16] Comments dated Nov. 22, 2013, *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/dodd-frank/comments-cfpb-respa-regz-nov2013.pdf.

[17] *See* Section-by-Section Analysis, 81 Fed. Reg. 72318 (Oct. 19, 2016).

[18] Comments submitted by USTP, March 13, 2015.

servicing industry, the CMC's position on whether the final rule protects consumers should be viewed with skepticism. The organizations that represent the interests of consumers and have participated in this rule making proceeding believe strongly that the final rule furthers the consumer protection purposes of the Bankruptcy Code and the Truth in Lending Act, by preserving the ability of bankruptcy borrowers to receive essential account information.

We urge the Bureau to trust the opinions of those who have represented consumers in bankruptcy cases, rather than members of the CMC, when it comes to assessing whether the final rule protects and assists consumers. Moreover, the CFPB already has carefully balanced consumer interests with those of servicers in crafting the final rule.

3. Consumer testing conducted by the Bureau confirms that bankruptcy debtors gain significant benefits from receiving periodic statements.

The CMC suggests that the final rule will be harmful to consumers and "lead to significant consumer confusion." While the bankruptcy and consumer communities strongly believe the final rule will lessen confusion for bankruptcy debtors, the Bureau should reject this contention based on its own consumer testing.

The consumer testing conducted by the Bureau confirms that bankruptcy debtors gain significant benefits from receiving periodic statements. The participants appreciated the value of receiving statements based on form statements that are very similar to the final sample forms that the Bureau will make available in Appendix H to Part 1026. As one Chapter 7 participant in Round 1 stated, "I don't know why anybody would not want to receive these notices."[19] A Chapter 13 Round 1 participant noted that the statement information would help avoid calls to the trustee: "I would rather get this. It would help. I would be able to keep up with it a lot more. . . It would alleviate me calling my trustee a lot."[20]

A Chapter 7 participant in Round 2 stated: "I wish I would have received something like that when I was going through this process, that's for sure."[21] A Chapter 13 Round 1 participant observed: "I don't find the notice to be threatening. Going through bankruptcy is a traumatic experience. To get a notice that is not threatening or demanding helps a lot. It's pertinent information that is presented not in a threatening way."[22]

4. Bankruptcy Rule 3002.1 does not obviate the need for the final rule.

The CMC contends that the periodic statement rule is not needed because Bankruptcy Rule 3002.1 provides consumer debtors with the "appropriate level of transparency" and information they need in a bankruptcy proceeding. The CMC letter (Feb. 7, 2018) suggests that action by the CFPB is unnecessary because the issues were "already comprehensively addressed by the Bankruptcy Rules Committee" by rules adopted in December 2011.

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[19] Report of Consumer Testing of the Proposed Sample Forms, p. 13.
[20] Report, p.13.
[21] Report, p. 33.
[22] Report, p. 33.

As a former member of the Bankruptcy Rules Committee and chair of its working group assigned to develop Bankruptcy Rule 3002.1 and related forms, the undersigned states unequivocally that this is not true.

At the time the Rules Committee was considering the Chapter 13 mortgage bankruptcy rules, Congress had already enacted the TILA amendment requiring periodic statements. Since Congress had not exempted consumers in bankruptcy from the coverage of 15 U.S.C. § 1638(f), and the Bureau had not yet issued the IFR creating a bankruptcy exemption, members of the Rules Committee working on Rule 3002.1 operated under the assumption that the information on periodic statements that debtors should receive in Chapter 13 mortgage cure cases would be determined by TILA and Regulation Z. Although the periodic statement rule had not gone into effect by 2011, it was expected that the rule would co-exist with and compliment Rule 3002.1.

This approach is consistent with how the Rules Committee dealt with mortgage payment change notices under Rule 3002.1(b). Notice of payment changes must be given on Official Form 410S-1 (Supplement 1), the Notice of Mortgage Payment Change.[23] The form operates essentially as a cover sheet by providing limited information and relying upon the more extensive disclosures given under TILA for adjustable rate mortgages and RESPA for escrow accounts. It instructs the mortgage creditor to attach to the form an escrow account statement or interest rate change notice "prepared in a form consistent with applicable nonbankruptcy law," which of course is TILA and RESPA.

Thus, Rule 3002.1 and the federal disclosure statutes work in tandem to give consumer debtors essential information about payment changes in a Chapter 13 case. There is no reason to believe that Rule 3002.1 was intended to supplant information required by the periodic statement rule. The CMC's claim that the Bureau's final rule "usurps the Judiciary's rule-making power" is specious.

5. The flexibility given to servicers under the final rule undermines the CMC's unfounded assertions about litigation risk.

Referring to it as a "significant new development" on the eve of the final rule's effective date following a five-year rule making process, the CMC suggests that the past payment breakdown on periodic statements will expose servicers to litigation "by trustees and possibly other parties." It is hard to understand the CMC's real concern because the final rule actually adopted the proposal sought by the servicing industry on the underlying issue.

In response to the proposed rule, some trade associations including the CMC requested that the final rule clarify that servicers are permitted to make disclosures on periodic statements according to the contractual accounting method rather than one consistent with bankruptcy law and the debtor's confirmed Chapter 13 plan. The Bureau ultimately acceded to this request by not requiring that disclosures be based on a specific accounting method. Determining that the periodic statement amendment to TILA is a disclosure provision, the Bureau stated:

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[23] Fed. R. Bankr. P. 3002.1(d).

> Some national trade associations asked that, if the rule required a principal-interest breakdown, the final rule should expressly endorse contractual accounting. The Bureau does not believe it is necessary or appropriate in this context to define how servicers should apply payments they receive from consumers in bankruptcy. Section 1026.41 imposes disclosure requirements; it does not establish accounting methods. Nonetheless, servicers must accurately disclose how they are applying payments, whether they use contractual or bankruptcy accounting.[24]

Having gotten its wish on this issue, the CMC's call for "urgent attention" is baffling. The Bureau's actions effectively reduce rather than amplify a servicer's litigation exposure from liability under TILA. If a consumer or trustee were to bring an action under TILA claiming that the disclosures on a periodic statement violate section 1026.41 solely because they reflect a contractual accounting method, the consumer or trustee would likely be unsuccessful because the Bureau has explicitly stated that final rule does not require a servicer to use any particular accounting method. A servicer would still face the potential for liability if the disclosures are inaccurate, but surely the CMC is not suggesting that the final rule should be repealed so that its members can have the right to send consumers inaccurate statements or to hide the misapplication of payments.

The CMC's concerns about litigation risk, raised at the eleventh hour of an exceedingly long rule making, are unfounded and certainly should not be allowed to be a basis for derailing the entire rule.

6. The Bureau should promptly finalize the proposed rule relating to the timing for servicers to transition to providing modified or unmodified periodic statements.

We support the proposed rule published on October 18, 2017 relating to the timing for servicers to transition to providing modified or unmodified periodic statements.[25] By creating a single-statement exemption, the proposed rule should make it easier for servicers to comply with section 1026.41. Although not addressed by the CMC, the proposed rule should also address concerns it has raised with respect to servicing transfers.

We urge the Bureau to promptly finalize the proposed transition rule and issue it as a final rule before the April 19, 2018 effective date of the bankruptcy statement amendments in the 2016 Mortgage Servicing Final Rule.

7. The CMC's requests for further clarification should not cause the Bureau to "repeal" or delay the final rule.

The CMC letters state that the final rule "fails to address very serious issues that have been presented to the CFPB for over five years," and that the Bureau should therefore "repeal"

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[24] *See* Section-by-Section Analysis, 81 Fed. Reg. 72339 (Oct. 19, 2016).
[25] 82 Fed. Reg. 48463 (Oct. 18, 2017).

the final rule. We dispute that these are "serious issues" that would in any way cause the Bureau to begin a new notice and comment proceeding to "repeal" the final rule. We also believe that the Bureau has already responded to several of these issues by giving servicers the flexibility that is discussed in several of the Official Interpretations issued with the final rule. For example, Official Interpretations ¶ 41(f)-4 states: "A periodic statement or coupon book provided under § 1026.41(f) may be modified as necessary to facilitate compliance with title 11 of the United States Code, the Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders."

On other issues, we believe that the CMC's concerns reflect a misreading of the final rule or a failure to consider the Official Interpretations. For example, the CMC states that the Bureau's rules and commentary do not allow a servicer to adjust the language in the final statement to a borrower if the loan is charged-off while the borrower is in bankruptcy. First, the CMC seems to believe that the final statement is required whenever a loan is charged-off. In fact, the final statement is required only if the loan is charged off and the servicer will not charge any additional fees or interest on the account.[26] This would be an extremely rare occasion in bankruptcy cases. Second, the regulation provides that the items to be disclosed are to be included in the final statement notice only to the extent they are "applicable."[27] If the consumer may not be required to pay the balance on the account in the future because the loan has been discharged in bankruptcy, this disclosure about future potential liability can be omitted because it is not applicable. Finally, Official Interpretations ¶ 41(f)-4 as discussed above, and ¶ 41(c)-1 and ¶ 41(c)-1, give servicers the flexibility to modify and provide additional explanatory information on periodic statements.

To the extent that any of the CMC concerns merit further clarification, this can be done by the Bureau through a variety of means without altering or repealing the final rule, such as in a supervisory bulletin, interpretive rule, policy guidance, technical correction rule, or a small entity compliance guide. We welcome the opportunity to provide input to the Bureau should it decide to consider clarification on the issues listed in the CMC letters.

We thank you for your consideration of these comments and urge the Bureau not to take any action that would alter or delay the final rule from becoming effective on April 19, 2018.

John Rao
Attorney, on behalf of the National Consumer Law Center, Inc. and the National Association of Consumer Bankruptcy Attorneys

cc: Laura A. Johnson
David H. Hixson
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[26] 12 C.F.R. § 1026.41(e)(6)(i)(A); 81 Fed. Reg. 72,160, 72,389 (Oct. 19, 2016).
[27] 12 C.F.R. § 1026.41(e)(6)(i)(B).