COMMENTS

to the

Consumer Financial Protection Bureau

12 CFR Parts 1024 & 1026

[Docket No. CFPB-2013-0031]

RIN 3170–AA37

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

Connecticut Fair Housing Center
LAF Chicago
Massachusetts Communities Action Network
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys
National Fair Housing Alliance
National Housing Law Project
New Economy Project
Vermont Legal Aid

Nov. 22, 2013

The **National Consumer Law Center**[1] ("NCLC"), on behalf of its low-income clients, and the **Connecticut Fair Housing Center,[2] LAF Chicago**,[3] **Massachusetts Communities Action Network,[4] National Association of Consumer Advocates,**[5] **National Association of Consumer Bankruptcy Attorneys,[6] National Fair Housing Alliance,[7] National Housing Law Project,[8] New Economy Project,[9] and Vermont Legal Aid[10]** submit the following comments in response to the CFPB's interim final rule. We urge the CFPB to make further changes before the rules take effect. These comments address the following recommendations:

- The Bankruptcy Exemption for Periodic Statements in the Interim Final Rule Should Not Be Adopted.

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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. These comments are written by NCLC attorneys, John Van Alst, Alys Cohen, Robert Hobbs, Andrew Pizor, John Rao, and Diane Thompson.

[2] The **Connecticut Fair Housing Center** is a statewide nonprofit civil rights organization dedicated to identifying, challenging and eliminating discrimination in housing through education, research, testing, counseling, foreclosure prevention, advocacy and enforcement.

[3] For more than 40 years **LAF** has provided people living in poverty in metropolitan Chicago with comprehensive free legal services to resolve non-criminal issues. Each year LAF's more than 80 full-time attorneys and staff help resolve civil legal problems, including domestic violence, consumer fraud, and unfair evictions. Its work helps more than 40,000 people annually.

[4] **Massachusetts Communities Action Network** is a federation of faith based community improvement organizations in 10 cities in Massachusetts and has worked on foreclosure prevention policy and legislative issues at the local, state and national levels.

[5] The **National Association of Consumer Advocates** ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[6] 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 3,500 members located in all 50 states and Puerto Rico.

[7] Founded in 1988, the **National Fair Housing Alliance** is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, D.C., the National Fair Housing Alliance, through comprehensive education, advocacy and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

[8] The **National Housing Law Project (NHLP)** is a nonprofit national housing and legal advocacy center established in 1968. Our mission is to advance housing justice for poor people by: increasing and preserving the supply of decent, affordable housing; improving existing housing conditions, including physical conditions and management practices; expanding and enforcing low-income tenants' and homeowners' rights; and increasing housing opportunities for racial and ethnic minorities.

[9] **New Economy Project** (formerly NEDAP) works with New York City groups to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. As part of its Financial Justice Law Project, New Economy Project provides direct services to thousands of low-income New Yorkers through a legal hotline; builds the capacity of legal services and community-based organizations to address consumer financial justice issues; and advocates for systemic reform.

[10] **Vermont Legal Aid** provides free civil legal services to people throughout Vermont who are poor, elderly, or have disabilities and who would otherwise be denied justice or the necessities of life.

- The Bankruptcy Exemption for Early Intervention Notifications in the Interim Final Rule Should Not Be Adopted.
- The Bureau Should Not Force Consumers to Choose Between Their FDCPA Rights and the Benefits of the Bureau's Servicing Rules.
- The Bureau Should Require Early Disclosure for All Dwelling-Secured Loans.
- The Bureau Should Clarify that Loans Secured by Manufactured Homes Deemed Real Property Under State Law Are Subject to RESPA Even When the Loan Is Not Secured by Land.

I. The Bankruptcy Exemption for Periodic Statements in the Interim Final Rule Should Not Be Adopted. [Section 1024.41(e)(5) – Consumers in Bankruptcy]

Mortgage servicers, except for servicers of subprime mortgage loans, have typically provided consumers with monthly statements or preprinted coupon books containing payment information. However, federal law has never required such statements or regulated their content. Even when servicers do provide monthly statements, they often stop providing them when the borrower is in default or in a bankruptcy proceeding, times when the information is potentially most needed.[11] Information that would assist a borrower in discovering account errors and avoiding default, such as the assessment of fees, application of past payments, or diversion of payments into suspense accounts, also generally has not been provided by servicers on monthly statements. An amendment to the Truth in Lending Act and related regulations, effective on January 10, 2014, change this by requiring that detailed periodic statements be sent to borrowers on most residential mortgage loans.

Periodic statements that are prepared under the new regulation will give borrowers significant information about their mortgage accounts. The disclosures provided on the statements may assist borrowers in determining whether an account is actually in default and whether a servicer has properly applied payments or improperly charged unauthorized fees. The regulation requires that the statements contain information in the following categories: amount due for the billing period, explanation of amount due on the account including fees imposed, past payment breakdown, transaction activity, partial payment information, contact and account information, and delinquency information if applicable. Several of these categories include disclosure of a partial payment that is sent to a suspense or unapplied funds account. This information is valuable to all borrowers, especially those who are in a bankruptcy proceeding.

In publishing the final periodic statement rule, the Bureau rejected requests from the mortgage industry for an exemption for borrowers in bankruptcy. The Bureau soundly concluded that borrowers in bankruptcy should not be deprived of the important information required by the periodic statement rule. Rather than adopt a blanket exemption, the Bureau advised servicers that they could make changes to the statements as they believe are necessary

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[11] *See In re* Monroy, 650 F.3d 1300 (9th Cir.2011) (approving local form plan language requiring secured creditors to continue sending periodic statements to debtors if they were provided pre-petition).

when a borrower is in bankruptcy, so as to reflect the payment obligations of the debtor in the bankruptcy proceeding.

Without following the notice-and-comment procedure, the Bureau has now retreated from the position it had carefully developed in the rulemaking proceeding. The Interim Final Rule amends the final 2013 RESPA and TILA Servicing Rules by creating broad bankruptcy exemptions for two of the servicing rules. Servicers are exempt from the requirement to provide periodic mortgage statements when borrowers are in a bankruptcy case. Servicers are also exempt from the requirement to provide early intervention notifications relating to loss mitigation options when borrowers are in a bankruptcy case (discussed in Part II below). The commentary issued with these rule changes also extends the exemptions in certain situations to periods when the borrower is no longer in a bankruptcy case, potentially for as long as the borrower is making payments on the mortgage. These changes become effective on January 10, 2014. These changes are ill-advised and will be harmful to consumers, and the Bureau should withdraw them.

A. There is No Irreconcilable Conflict Between the Periodic Statement Requirements in the 2013 TILA Servicing Rule and the Bankruptcy Code.

The rationale stated for the Bureau's retreat from the sound analysis in the original version of the rule is that there is a conflict between the original rule and the Bankruptcy Code. But this rationale is a significant departure from accepted conflict analysis used by courts (and federal agencies for rulemaking purposes) in considering the interplay between potentially overlapping federal statutes. In fact, it is this precise conflict analysis that the Bureau successfully employed when first promulgating the final 2013 RESPA and TILA Servicing Rules, and is now being ignored by the Bureau in the Interim Final Rule.

The proper analysis of the relationship between federal statutes is best described by the Seventh Circuit in *Randolph v. IMBS, Inc*.[12] The *Randolph* court noted that "[o]ne federal statute does not preempt another," and that the proper question is whether one of the statutes has been expressly or implicitly repealed:

> When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed (*citations omitted*). It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other.[13]

Applying this analysis, the *Randolph* court held that although there may be some "operational differences" between the Fair Debt Collection Practices Act and the Bankruptcy Code, there is no "irreconcilable conflict." In fact, the Seventh Circuit found that the two

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[12] 368 F.3d. 726 (7th Cir. 2004).

[13] *Randolph,* 368 F.3d. at 730. The Supreme Court has stated: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974).

statutes can work together, permitting a consumer for example to obtain more significant relief when both statutes' remedy provisions are applicable. Significantly, the *Randolph* court concluded that both statutes can be enforced effectively and that debt collectors "can comply with both simultaneously."[14]

Similarly, courts have held that the exercise of substantive RESPA rights requiring the production of information and correction of servicing errors is not an attempt to supplant the Bankruptcy Code procedure for adjudication of creditor claims.[15] Adherence to RESPA and TILA requirements for calculation of escrow amounts and notification of payment changes likewise is wholly consistent with the goal of facilitating mortgage default cures in chapter 13.

As part of the lengthy, deliberative process that led to the final 2013 RESPA and TILA Servicing Rules, mortgage industry commenters suggested that the periodic statement rule should not apply to borrowers in bankruptcy because accounting issues related to the treatment of prepetition arrearages were problematic. The Bureau's response at that time was sensible – complexity alone does not justify a complete exemption, but may warrant certain adjustments. In fact, the Bureau noted that it is the "complexities" of the bankruptcy scenario that "necessitate" that periodic statement information be provided to consumers.[16] Applying a conflict analysis similar to that set out in *Randolph v. IMBS, Inc.*, the Bureau stated that while certain laws such as the Bankruptcy Code and the FDCPA may prevent the collection of a debt, these laws do not prevent a servicer from sending a periodic statement that is tailored to the particular circumstances of the bankruptcy case. The Bureau instructed that servicers could make changes to the statement as they believe are necessary when a borrower is in bankruptcy, so as to reflect the payment obligations of the debtor in the bankruptcy proceeding. The Bureau even provided a sample message servicers may add to the statement to avoid potential conflict with the automatic stay and discharge injunction.[17]

Mortgage industry representatives have apparently raised concerns that the Bureau did not make this flexibility explicit in § 1026.41 or in the commentary. If the Bureau believes that this is a legitimate concern, the more appropriate action would be to provide guidance in the

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[14] *Randolph*, 368 F.3d. at 730. *See also* Simon v. FIA Card Services, N.A., 732 F.3d 259 (3d Cir. 2013) (following approach in *Randolph*); Rios v. Bakalar & Associates, P.A., 795 F.Supp.2d 1368 (S.D. Fla. 2011); Clark v. Brumbaugh and Quandahl, P.C., LLO, 731 F.Supp.2d 915 (D. Neb. 2010); Dougherty v. Wells Fargo Home Loans, Inc., 425 F. Supp. 2d 599 (E.D. Pa. 2006); *In re* Gunter, 334 B.R. 900 (Bankr. S.D. Ohio 2005).

[15] Conley v. Cent. Mortg. Co., 414 B.R. 157 (E.D. Mich. 2009) (RESPA permits a debtor in bankruptcy to obtain information through a qualified written request that will assist debtor in determining whether to object to a proof of claim, and such RESPA requests are applicable in bankruptcy even though similar right exists under Bankruptcy Rules); *In re* Payne, 387 B.R. 614 (Bankr. D. Kan. 2008) (RESPA applies in bankruptcy); *In re* Figard, 382 B.R. 695 (Bankr. W.D. Pa. 2008) (RESPA does not conflict with claims objection procedure set out in the Bankruptcy Code and Rules); *In re* Padilla, 379 B.R. 643, 666-67 (Bankr. S.D. Tex. 2007) (concluding that "[n]othing in the Bankruptcy Code immunizes mortgagees from causes of action based on RESPA"); *In re* Sánchez-Rodríguez, 377 B.R.1 (Bank. D. P.R. 2007) (debtors who filed chapter 13 bankruptcy to save home from foreclosure entitled to seek information about mortgage in qualified written request); *In re* Holland, 374 B.R. 409 (Bankr. D. Mass. 2007).

[16] *See* Section-by-Section Analysis, § 1026.41(d)(2), 78 Fed. Reg. 10966 (Feb. 14, 2013).

[17] *See* Section-by-Section Analysis, § 1026.41(d)(2), 78 Fed. Reg. 10966, note 125 (Feb. 14, 2013) ("For example, servicers may include a statement such as: 'To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this statement is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation. However, Creditor retains rights under its security instrument, including the right to foreclose its lien.'").

regulation, commentary, or official interpretation rather than adopt a complete bankruptcy exemption. For example, the Bureau could add a new comment to the Official Interpretations for § 1026.41 as follows: "Section 1026.41 does not require a servicer to communicate with a consumer in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. To the extent permitted by such law or court order, a servicer may adapt the requirements of § 1026.41 in any manner believed necessary."

Quite simply, the Bureau got it right when it first considered this issue. There is no sound reason for the Bureau to reject its prior well-reasoned analysis that led to the final 2013 RESPA and TILA Servicing Rules. Moreover, it is particularly troubling that the Bureau has elected to suddenly retreat from its prior position on the eve of the servicing rules' effective date, without engaging in proper notice and comment rulemaking. If the Bureau believes that further study of this issue is needed, it should initiate a new rulemaking docket, but should permit the final 2013 RESPA and TILA Servicing Rules to go into effect without the bankruptcy exemptions included in the Interim Final Rule.

B. Periodic Statements Provide Useful Information That is Not Confusing to Borrowers in Bankruptcy.

Many borrowers who seek to cure a mortgage default file bankruptcy under chapter 13 of the Bankruptcy Code.[18] Mortgage servicers and debtors both benefit greatly when mortgage accounts being paid under a chapter 13 cure plan are treated in the normal course as they would outside of bankruptcy. This is also true for borrowers who file bankruptcy for nonmortgage related reasons and are current on their mortgage payments, and intend to remain current during and after the bankruptcy. Borrowers in bankruptcy are more likely to avoid payment problems when they receive timely account and payment information, have their payments calculated and applied correctly, and have the ability to dispute account errors, all rights granted to them under the RESPA and TILA. Servicers avoid costs by not having to develop special bankruptcy protocols. While there are some unique payment application issues that arise when a mortgage default is cured in a chapter 13 case, even these are similar to servicers' handling of payments under nonbankruptcy repayment and modification agreements in which arrearages are being repaid.

The information required to be provided in periodic statements under § 1026.41 does not conflict with the Bankruptcy Code. Servicers can adapt the sample forms provided in appendix H-30 in a manner consistent with bankruptcy law that accurately reflects the payment considerations of a borrower in bankruptcy. As an initial matter, the sample form can include the statement recommended by the Bureau that "this statement is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation." If the borrower's chapter 13 plan provides that the trustee will disburse ongoing, postpetition mortgage payments to the servicer, the periodic statement can simply add a notation to the "amount due" box, such as: "this payment is to be made by the trustee in your chapter 13 case." If the borrower is to disburse ongoing payments directly to the servicer, no change is needed to the "amount due" box, or language could be added such as:

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[18] Under § 1322(b)(5) of the Bankruptcy Code, a debtor's chapter 13 plan may provide for the curing of a default and the maintenance of ongoing payments on long-term debt.

"Additional amounts may be received from the trustee in your chapter 13 bankruptcy case." As for disbursements made by the trustee on arrearages since the last statement, these can be reflected in the "transaction activity" box and labeled as: "Payment Received from Trustee."

The manner in which the servicer has applied payments received from the borrower and the trustee, whether regular periodic (PITI) payments from the borrower or the trustee or arrearage payments from the trustee, would be reflected in the "Past Payments Breakdown" box. Alternatively, it would also be possible to create an additional box just below or near the payments breakdown box, using the same format, that would be labeled: "Past Trustee Payments Breakdown." This box would show only how payments from the trustee have been applied. In order to avoid confusion about whether the debtor has properly cured defaults, trustees and borrowers must have the disclosure of this information, and nothing in TILA or the Bankruptcy Code prohibits disclosure of how the servicer has applied these payments. Too often servicers have refused to disclose how payments are applied in chapter 13 cases, obscuring their failure to properly apply payments in accordance with bankruptcy law and the underlying mortgage contract.[19] Disclosure of how payments have been applied is a hallmark of the periodic statement requirement in TILA, and there is no reason to conclude that Congress intended this important consumer protection to be withheld from borrowers in bankruptcy.

Very similar considerations and complexities apply when the borrower is curing a default under a loss mitigation forbearance or repayment plan, as some portion of the borrower's payment is to be applied to the arrearage. The Bureau has not provided any special guidance on how payments made on an arrearage under a six or twelve month payment forbearance program are to be reflected in the "past payment breakdown" box, and no exemption to the periodic statement requirements has been provided for such loss mitigation payment programs. Obviously, the Bureau believes that servicers can disclose this information in a manner that is not confusing to borrowers, and bankruptcy should not be treated differently.

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[19] *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 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).

The effect of a cure in a chapter 13 case is to nullify all consequences of the pre-bankruptcy default. The House Report to the Bankruptcy Reform Act of 1994 reaffirms that this is the intent of Congress. *See* H.R. Rep. No. 835, 103d Cong., 2d Sess. 55 (1994) reprinted in 1994 U.S.C.C.A.N. 3340 ("It is the committee's intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred."). Once the debtor's chapter 13 plan is confirmed in a case involving a long-term mortgage, the debtor's ongoing regular mortgage payments should be applied from the petition date based on the mortgage contract terms and original loan amortization as if no default exists. *See In re* Wines, 239 B.R. 703 (Bankr. D. N.J. 1999); *In re* Rathe, 114 B.R. 253 (Bankr. D. Idaho 1990). All pre-bankruptcy arrearages are paid separately under the plan as a part of the mortgage servicer's allowed claim. *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").

A scenario that is potentially even more confusing to borrowers than a bankruptcy cure plan involves payments due under a trial or temporary payment plan in a loan modification program, as these periodic payments differ from the borrower's actual contractual periodic payments. Despite the difficulties in effectively communicating this information on periodic statements, again the Bureau did not address this in the rule or commentary, and no exemption for trial plans has been provided. In fact, the Bureau has provided informal guidance to servicers on how to comply with the rule with respect to trial plans:

> It's important to keep in mind that the periodic statement is designed to provide important information to borrowers, including the amount that they're expected to pay. Further, note that the periodic statement must reflect the legal obligation between the parties. There's also flexibility built into the periodic statement requirement and you can add information to it as long as it doesn't obscure the required disclosures. So, using the example that Whitney just gave for a trial mod, if we suppose that the borrower's regular, contractual payment is $1,000 a month, but they're in a trial mod that reduces the payment to $800 a month, you could reflect that on the periodic statement by, at the top of the form, you could say that the amount due is $800. The explanation of the amount due can be used to explain the difference between the $1,000 and the $800. You can explain that the principal and interest in escrow is $1,000 and at the end of the explanation of the amount due items, you could show that you subtracted $200 from the $1,000 due to the trial mod. And that gets you to the $800 amount due.[20]

Rather than adopt a bankruptcy exemption, borrowers, trustees, servicers and bankruptcy courts would be far better served if the Bureau used its expertise, as it has in the above example with trial plans, to provide formal and informal guidance on compliance with § 1026.41 for borrowers in bankruptcy. This could be done in consultation with bankruptcy specialists and industry representatives without engaging in formal rulemaking.

C. Bankruptcy Courts Have Recognized that Disclosures Required under RESPA and TILA are Critically Important to Borrowers in Bankruptcy.

In response to long-standing problems with mortgage servicing and claim documentation in chapter 13 cases,[21] Federal Rule of Bankruptcy Procedure 3002.1 was enacted on December 1, 2011. This rule requires certain disclosures of a mortgage borrower's payment obligations during a chapter 13 bankruptcy, including disclosure of postpetition mortgage payment changes and the assessment of fees on the account. The rule is intended to give the borrower information needed to avoid further default and to emerge from bankruptcy without being surprised by undisclosed fees and payment amounts due.[22]

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[20] CFPB Update on Servicing Rules, Joint Webinar presented by the CFPB and Mortgage Bankers Association, October 16, 2013.

[21] *See* Katherine M. Porter, Misbehavior and Mistake in Bankruptcy Mortgage Claims, 87 Tex. L. Rev. 121 (2008).

[22] *In re* Thongta, 480 B.R. 317, 319 (Bankr. E.D. Wis. 2012) ("Previously, debtors could emerge from bankruptcy facing significant post-petition mortgage obligations that they did not know existed because mortgage creditors, for fear of violating the automatic stay, would not inform debtors of post-petition charges. To combat the problem, courts adopted local rules or confirmed plans requiring mortgage lenders to disclose all post-petition charges. With the enactment of Rule 3002.1, courts nationally are able to ensure that debtors who successfully complete "cure and

Bankruptcy Rule 3002.1(b) specifically requires mortgage creditors to provide borrowers with "a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due." The rule is intended to operate in conjunction with RESPA and TILA for payment changes on mortgage accounts that result from interest rate and escrow account adjustments. With respect to these payment changes, the Official Bankruptcy Form (Form 10, Supplement 1) that implements Rule 3002.1(b) operates essentially as a cover sheet by providing limited information and relying upon the more extensive disclosures given by the notices under RESPA and TILA. Thus, the mortgage creditor is required to attach to the bankruptcy form a RESPA escrow account statement or TILA interest rate change notice in a form consistent with applicable nonbankruptcy law (RESPA and TILA).

It is important to note that Bankruptcy Rule 3002.1(b) is intended in part to override the ill-advised exemption adopted by the Bureau's predecessor when implementing RESPA's escrow account statement requirement. Section 1024.17(i)(2) of Regulation X provides that a servicer is "exempt from the requirements of submitting" an annual escrow statement if the borrower is in bankruptcy (or more than thirty days overdue) at the time the servicer conducts the escrow analysis. This exemption was included with little or no analysis by HUD as to whether there were any actual conflicts between RESPA and the Bankruptcy Code, or whether a pending bankruptcy case would prevent servicers from complying with the annual notice requirement.[23] The exemption caused huge problems for borrowers in bankruptcy before Rule 3002.1(b) went into effect, by denying borrowers critical information needed to keep current on mortgage obligations.[24]

The Bureau should not repeat the mistake made by HUD by depriving borrowers of the essential mortgage account information contained in periodic statements while they are trying to cure a mortgage default and remain current with payments. Mortgage servicers' claims that

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maintain" Chapter 13 plans emerge from bankruptcy with either a fully current home mortgage or the knowledge of and ability to object to any claimed amounts due."); *In re* Sheppard, 2012 WL 1344112, at *6 (Bankr. E.D. Va. April 17, 2012) ("Rule 3002.1 is a procedural mechanism designed to effectuate the Chapter 13 policy goal of providing debtors a 'fresh start.'").

[23] As evidence that the bankruptcy exemption for escrow statements was not well-reasoned, it is worth noting that the regulation did not include any discussion of bankruptcy when first promulgated under the notice and comment rulemaking procedure. Prior to the regulation's effective date, however, HUD added the bankruptcy exemption as a "technical correction" to the rule language without soliciting comment. *See* 60 Fed. Reg. 8812 (Feb. 15, 1995).

[24] *In re* Wright, 461 B.R. 757 (Bankr. N.D. Iowa 2011) (servicer failed to notify trustee, debtor, or debtor's counsel of changes in mortgage payments); *In re* Foreman, 2010 WL 2696630 (M.D. N.C. July 7, 2010) (servicer failed to provide notice of change in monthly payment and instead permitted a $12,000 arrearage to accrue); *In re* Payne, 387 B.R. 614, 637 (Bankr. D. Kan. 2008) ("When a lender silently accepts payments for over three years without notifying the borrower the payments are insufficient, when the borrower believes his taxes and insurance are being paid by his monthly payments to his lender, and when the borrower has no reason to know the lender is advancing taxes and insurance and thereby increasing borrower's indebtedness, the lender waives his right to recover the advances from the borrower."); *In re* Johnson, 384 B.R. 763 (Bankr. E.D. Mich. 2008) (creditor waived its right to recover arrearage for taxes and insurance by failing over five year period to disclose payment increases); *In re* Dominique, 368 B.R. 913 (Bankr. S.D. Fla. 2007) (servicer failed to provide escrow statements during chapter 13 plan and just before plan completion provided debtors with an escrow account review indicating a $6397 escrow deficiency); *In re* Rizzo-Cheverier, 364 B.R. 532 (Bankr. S.D. N.Y. 2007) (servicer allowed deficiency in escrow account to accrue without notice to debtor).

bankruptcy is different were used for years to obfuscate their egregious accounting practices in bankruptcy cases, and the bankruptcy exemption would only serve to continue to prevent transparency of their bankruptcy accounting, making continued errors and abuses far more likely.

Many bankruptcy courts have adopted local rules or forms that acknowledge the importance of keeping debtors properly informed of essential mortgage payment information that may be provided on periodic statements. These rules and chapter 13 plan forms generally make clear that servicers do not violate the automatic stay by providing periodic statements and that servicers must provide periodic statements to debtors in bankruptcy if they provide such statements in the ordinary course of business to borrowers who are not in bankruptcy. The following are examples of local rules or chapter 13 plan forms with such provisions:

- **M.D. Ala. LBR 4001-2.** Subsection (a)(4) allows creditors with a claim secured by the debtor's principal residence to "send all payment coupons or statements of account that the creditor provides to its non-bankruptcy debtors."
- **N.D. Ala. LBR 4072-1.** Secured creditors in a chapter 13 case may "make reasonable contact" with the debtor as to direct payments. Reasonable contact includes issuing monthly bills and statements for post-petition payments.
- **S.D. Ala. Chapter 13 Plan.** Item 13(c) allows secured creditors and lessors receiving direct payments from the debtor to continue to mail customary monthly notices notwithstanding the stay.
- **D. Colo. LBR 4001-4.** The local bankruptcy rule provides that "issuance of monthly statements is not a stay violation." The rule details that secured creditors may send debtors statements that are also sent to nondebtor customers. These communications must be made "in the ordinary course of business" and must not contain an attempt to collect debt.
- **S.D. Ill. Model Chapter 13 Plan.** Section 15 of the Plan permits mortgage creditors to mail customary notices to debtors notwithstanding the stay.
- **E.D. La. General Order 2012-1.** Under the "General Provisions" of the Chapter 13 Plan, secured claimants may continue to send debtors "notices, statements or other written information on the status of direct, monthly post-confirmation payments" through the duration of a plan.
- **D. Md. LBR 4001-5.** Rule 4001-5 permits creditors and lessors to provide customary notices, including monthly statements. Providing notices does not violate the automatic stay.
- **D. Mass. LBR 4001-3.** Under Rule 4001-3, relief from the automatic stay is "deemed granted" to enable secured creditors to send written correspondence, including statements or notices that the creditor sends to its nondebtor customers. Creditors must provide a copy to debtor's counsel and may not demand payment nor threaten foreclosure or dismissal of the case.
- **E.D. Mich. Chapter 13 Plan.** Section V.Z ("Creditor's Authorization to Contact Debtor") allows secured claimants to send "periodic statements and annual or periodic summaries of accounts" where the debtor intends to retain the collateral.
- **E.D. Mo. LBR 3021.** Under section F, creditors with a security interest in real estate are permitted to provide billing and account information to the debtor. Direct contact by mail providing such billing information is not considered a violation of the stay.

- **W.D. Mo. LBR 4001-4.** Under LBR Rule 4001-4, mortgage creditors may send periodic statements of account “in the ordinary course of business” so long as the statement does not contain a demand for payment.
- **D. Mont. LBR 4001-3.** Section (b) permits mortgage creditors to provide monthly statements where debtors have indicated an intent to retain the collateral. Section (d) states that issuance of monthly statements does not violate the stay.
- **D. Kan. Bk. Standing Order 08-4.** Under subsection (b)(2), mortgage creditors that provided monthly statements prepetition must continue to do so for debtors “who have indicated an intent to retain” the collateral, up until the creditor “has been granted relief from the automatic stay.” Subsection (c) goes on to say that creditors who provide monthly statements “shall not be found to have violated the automatic stay.”
- **D.N.J. LBR 4001-3(a).** Secured creditors may send regular monthly statements to debtors without violating the automatic stay or any discharge injunction in chapter 7, chapter 13, and chapter 11 cases.
- **N.D.N.Y. Chapter 13 Plan.** Section II.B states that secured creditors being paid directly by the debtor “shall continue to send customary payment coupons, statements, and notices.” Sending notices does not constitute a basis for finding a stay violation.
- **E.D.N.C. LBR 4001-2.** Secured creditors may send statements of account provided to non-bankruptcy customers where the debtor indicates an intent to retain the collateral. Transmission of statements does not violate the stay or a discharge injunction.
- **M.D.N.C. Standing Order In re Terms and Provisions Available for Incorporation into Chapter 13 Confirmation Orders.** Section B.4, applicable to creditors with a security interest in real property, states that “[t]he secured creditor shall continue to send monthly statements to the debtor in the same manner as existed pre-petition and such statements will not be deemed a violation of the automatic stay.”
- **W.D.N.C. LBR 4001-1.** Subsection (e) requires secured creditors receiving direct payments from debtors who have indicated an intent to retain the collateral to “send all payment coupons or statements of account that the creditor provides to its non-bankruptcy borrowers.” The act of sending payment statements does not violate the automatic stay or a discharge injunction.
- **D.N.H. LBF 3015-1A.** Section 11.F.1 (“Duty of Mortgage Servicer to Provide Loan Information”) states that upon written request by a debtor, mortgage servicers shall provide all information, including monthly statements, respecting a mortgage loan. Providing such statements is not a violation of the automatic stay or a discharge injunction.
- **N.D. Ohio Admin. Order 13-02 In re Form Chapter 13 Plan.** Item 10.B allows creditors with a claim secured by real property to continue to mail customary notices to debtors notwithstanding the stay.
- **D. Ore. LBR 3015-1.** Subsection (b)(4) permits secured creditors receiving direct payments through a confirmed plan to “deliver to the debtor coupon books, notices regarding payment changes, and account statements.”
- **D.R.I. LBR 4001-1.** This rule addresses permitted activities under the automatic stay. Subsection (a)(1) permits affected secured creditors to send statements and “other

similar correspondence that the creditor typically sends to its non-debtor customers." Creditors must terminate these communications upon request of the debtor.

- **D.S.C. Exhibit A to LBR 3015-1.** Under section IV.B.1 of the Chapter 13 Plan, secured creditors to be paid directly by the debtor "may send standard payment and escrow notices, payment coupons, or inquiries about insurance, and such action will not be considered a violation of the automatic stay."
- **N.D. Tex. Standing Order 2010-01.** Under item 15 of the Standing Order Concerning All Chapter 13 Cases ("Monthly Statements Will Not Violate the Automatic Stay"), creditors do not violate the automatic stay by sending debtors "customary monthly statements" unless the debtor requests that the creditor discontinue statements. Where a creditor has a lien on real property and the plan provides for direct payments, the creditor must continue to send "regular payment invoices" if it did so prepetition.
- **S.D. Tex. Uniform Plan and Motion for Valuation of Collateral.** Section 4.A, dealing with claims secured only by a security interest in the debtor's principal residence, provides that "[t]he automatic stay is modified to allow holders of secured claims to send only monthly statements (but not demand letters)." Sections 5, 6, and 8, which deal with other claims, also contain the same provision.
- **W.D. Tex, Austin Div. Exhibit #1 to Standing Order for Chapter 13 Case Administration.** Section III.C of the Chapter 13 Plan authorizes creditors being paid directly by debtors to send monthly statements to the debtors.
- **W.D. Tex., San Antonio Div. Chapter 13 Plan.** Page 17 of the Chapter 13 Plan allows creditors receiving direct payments to "continue to issue payment books, coupons and any other method normally used to make and receive periodic payments" without violating the stay.
- **D. Vt. LBR 3071-1.** Section (b) requires secured creditors to provide loan statements where a debtor retains the collateral and makes regular installment payments directly to the creditor. Compliance with the rule does not violate the automatic stay. Section (h) allows mortgage creditors who are not required to provide loan statements to send monthly statements without violating the stay.
- **W.D. Wash. LBR Form 13-4.** Item X.E of the Chapter 13 Plan permits secured creditors to provide "notices, statements or other information" without violating the stay.
- **E.D. Wis. Model Chapter 13 Plan.** Item 11 allows creditors being paid directly by the debtor to mail customary monthly notices or statements notwithstanding the stay.

Contrary to the Bureau's reasoning for adopting the Interim Final Rule, many bankruptcy courts have concluded that providing periodic statements to borrowers does not cause borrower confusion, does not violate the automatic stay or discharge injunction or other bankruptcy law, and is beneficial to the bankruptcy system. However, these local court rules and plan provisions provide limited protection to borrowers in bankruptcy because they generally do not require the servicer to provide periodic statements. In general, they simply clarify that a servicer may provide periodic statements without violating the automatic stay or that they should be provided if nonbankruptcy borrowers are given statements. The Interim Final Rule will significantly undermine the intent and effect of these local rules and plan provisions as servicers will contend that compliance is no longer required based on the RESPA exemption.

D. Mortgage Creditors' Fear That Periodic Statements May Violate the Automatic Stay or Discharge Injunction is Spurious and Should Not Provide the Basis for a Bankruptcy Exemption

The Bureau has indicated that it has not taken a position on whether sending periodic statements violates the automatic stay or discharge injunction. It has nevertheless used this issue as a justification for adopting the Interim Final Rule. In doing so, the Bureau has ignored the overwhelming and unequivocal view of the courts that sending regular informational statements about a borrower's mortgage account, without an attempt to collect the debt or impose personal liability for such obligation on the borrower, does not violate the automatic stay or discharge injunction.[25] 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 or followed the borrower's unambiguous request not to receive such statements.[26] Servicing policy should not be dictated by the atypical practices of a few bad actors.

E. If the Bureau Retains Some Form of a Periodic Statement Exemption, a More Narrowly Drafted Exemption Should Apply Until the Bureau Has Completed Notice and Comment Rulemaking.

[25] Morgan Guar. Trust Co. of N.Y. v. Am. Sav. and Loan Ass'n, 804 F.2d 1487, 1491 (9th Cir. 1986) (mere requests for payment and simple statements for informational purposes do not violate the automatic stay); Pearson v. Bank of America, 2012 WL 2804826 (W.D. Va. Jul 10, 2012) (statements that were prominently labeled "for informational purposes" and which clearly stated were not an attempt to collect the debt did not violate discharge injunction); *In re* Ramirez, 280 B.R. 252 (C.D. Cal. 2002) (mere mailing by a creditor of informational billing statements not a violation of stay); *In re* Knowles, 442 B.R. 150, 161 (B.A.P. 1st Cir. 2011) (simply filing a proof of claim, mailing an annual tax statement, or providing the debtor with an optional payoff statement are not violations of the automatic stay); *In re* Zotow, 432 B.R. 252, 260 (B.A.P. 9th Cir. 2010) (mailing of an informational notice describing increase in monthly escrow payments was not a violation of the plan because 1) there were no attempts to collect prepetition escrow arrearages, 2) the information contained in the notice was necessary and helpful to the debtors since any increase in their monthly escrow payments would affect the feasibility of their plan, and 3) these notices do not rise to the level of coercion or harassment); *In re* Schatz, 452 B.R. 544, 548 (Bankr. M.D. Pa. 2011) (servicer's action in mailing a mortgage statement to chapter 13 debtor after commencement of the case did not violate the automatic stay because it was not an act to collect, assess or recover a claim against the debtor that arose pre-filing); *In re* Singh, 457 B.R. 790, 801 (Bankr. E.D. Cal. 2011) (the calculation and filing of change in mortgage payment cannot, in itself, be a violation of automatic stay, as this requires more harassing or coercive conduct by the creditor); Henry v. Assocs. Home Equity Servs., Inc. (*In re* Henry), 266 B.R. 457, 472 (Bankr. C.D. Cal. 2001) (if promissory note has adjustable interest rate, secured creditor may properly give notice of the changes in the interest rate); Chase Manhattan Mortgage Corp. v. Padgett, 268 B.R. 309, 314–15 (S.D.Fla.2001) (stating that § 362(a) does not prohibit mere notice to a mortgagor in bankruptcy of an advance or escrow deficiency). *See also* Home Funds Direct v. Monroy (*In re* Monroy), 650 F.3d 1300 (9th Cir. 2011) (approving chapter 13 plan provisions requiring servicers to provide monthly statements or coupon books, and notice of payment changes and fees).

[26] *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 re* Draper, 237 B.R. 502, 504 (Bankr. M.D. Fla. 1999) (finding a violation of the automatic stay where creditor continuously mailed statements to the chapter 13 debtor even after debtor and debtor's attorney made numerous requests to stop sending the monthly statements).

A significant problem with the Interim Final Rule is that it treats all borrowers in bankruptcy the same. The blanket exemption in the Interim Final Rule fails to distinguish between borrowers who are current with their mortgage payments at the time of the bankruptcy filing and intend to remain current, with those who are in default and have no intention of curing the default. It fails to distinguish between borrowers who have filed a Statement of Intention with their bankruptcy schedules in a chapter 7 case indicating their intent to retain the property by reaffirming the debt or continuing to make payments and those borrowers who have filed a Statement indicating an intent to surrender the property. Nor does the exemption treat differently borrowers who are curing a mortgage default in a chapter 13 bankruptcy. As a borrower could conceivably go three to five years under a chapter 13 plan without receiving periodic statements, the exemption serves only to undermine the potential for successful plan completion and jeopardizes the debtor's fresh start even if the plan is completed.

If the Bureau determines that an exception is necessary, it Bureau should adopt a narrow exemption based on rational distinctions between borrowers rather than a complete exemption. These distinctions should be readily identifiable by servicers so that the rule would be administratively practicable. The revised rule should provide that periodic statements must be provided to all borrowers in bankruptcy, except those borrowers in the following situations:

- The borrower has filed a Statement of Intention (Official Form 8) in a chapter 7 case and checked the box on the form indicating that the property secured by the subject mortgage will be surrendered.

- The borrower has filed a chapter 13 case and the borrower's chapter 13 plan provides that the property secured by the subject mortgage will be surrendered.

- The borrower in a chapter 13 case is in default on the mortgage when the case is filed and the borrower's plan does not provide for the curing of the default or payment of the mortgage, or some other provision providing for retention of the property and treatment of the creditor's mortgage claim.

- The borrower or the borrower's attorney in a chapter 7 or chapter 13 case has affirmatively indicated that the borrower does not wish to receive periodic statements.

F. If the Bureau Determines That the Blanket Exemption Should Be Retained, Official Interpretation Section 1026.41(e)(5) Should Be Deleted.

If the Bureau determines that the blanket exemption should be retained, the Bureau should remove in its entirety the Official Interpretation section 1026.41(e)(5) that was issued with the Interim Final Rule. This Interpretation treads on matters that extend beyond the scope of new section 1024.41(e)(5), as it is not limited to events occurring while the borrower is in an active bankruptcy case. Any other considerations, such as when a borrower has completed a bankruptcy case, should not be addressed until the Bureau has had an opportunity, as required by the Administrative Procedures Act, to engage in further study of the relevant issues after notice and comment.

For example, comment 41(e)(5) - 2(ii) provides that compliance with the periodic statement requirements is not required if any portion of the mortgage debt is discharged in bankruptcy. This fails to recognize that many consumers file chapter 7 bankruptcy cases, often for reasons unrelated to their mortgage, and do not reaffirm discharged debts. Many of these consumers continue to make mortgage payments while the bankruptcy is pending, and continue to maintain payments for months and years after receiving a discharge. In fact, the Bankruptcy Code discourages reaffirmation of mortgage debt by providing that a mortgage creditor may continue to seek and collect periodic payments on the mortgage 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.[27] Comment 41(e)(5) - 2(ii) is inconsistent with the policy expressed by Congress in section 524(j) of the Bankruptcy Code that mortgage creditors should treat borrowers who have discharged mortgage debt in the ordinary course in seeking and collecting mortgage payments, which should include providing periodic statements.

In addition, comment 41(e)(5) - 3 dealing with joint obligors is too broadly drafted and does not take into consideration the differences between chapter 7 and 13 cases. This section provides that if there are joint obligors on a mortgage, the exemption applies if any of the borrowers is in bankruptcy. An example is given of a husband and wife who jointly own a home, stating that "if the husband files for bankruptcy, the servicer is exempt from providing periodic statements to both the husband and the wife." If the husband in this example filed a chapter 7 bankruptcy case, the automatic stay in his case does not apply to his spouse or any other joint obligors as there is no co-obligor stay in chapter 7. The Interpretation would prevent the wife in the example provided by the Bureau from receiving periodic statements even if the husband filed a chapter 7 case years after the couple were separated or divorced and the wife is continuing to make mortgage payments. As the Bureau's apparent rationale for adopting the exemption is based on potential stay violations, which we believe is erroneous even in chapter 13 cases, this Commentary provision should be deleted or at a minimum redrafted so as to apply only when one of the joint obligors files a chapter 13 case in which the co-obligor stay under section 1301 of the Bankruptcy Code is applicable as to the nonfiling co-obligor.

II. The Bankruptcy Exemption for Early Intervention Notifications in the Interim Final Rule Should Not Be Adopted. [Section 1024.39(d)(1) – Borrowers in Bankruptcy]

A. Compliance with the Early Intervention Requirements Does Not Conflict with the Bankruptcy Code.

The Bureau initially refused to create a bankruptcy exemption from the early intervention requirements in the 2013 RESPA Servicing Rule. The Bureau correctly noted in promulgating the final rule that a borrower could have filed for bankruptcy but still be eligible for loss

[27] *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).

mitigation assistance.[28] Rather than adopt a broad exemption, the Bureau made several changes to the final rule and commentary intended to demonstrate that compliance with RESPA and the Bankruptcy Code is feasible and appropriate.

Regulation X section 1024.39(c) provides that nothing in the regulation requires a servicer to communicate with a borrower in a manner otherwise prohibited by applicable law. The commentary for this provision had clarified that a servicer is not required to communicate with a borrower in a manner "inconsistent with applicable bankruptcy law or a court order in a bankruptcy case," and that the requirements may be adapted in any manner that would permit information to be provided to borrowers about loss mitigation options to the extent permitted by bankruptcy law or court order.[29] The Bureau noted that by adding the commentary, it was not intending to interpret the Bankruptcy Code, but simply indicating that servicers should have flexibility in complying with the rule and bankruptcy law.[30]

The Bureau's initial approach gave servicers sufficient flexibility and guidance so that a broad exemption was not needed. Most importantly, the Bureau's initial decision not to grant a broad bankruptcy exemption made Regulation X consistent with industry-wide servicing guidelines for government sponsored loss mitigation programs. The Interim Final Rule marks a stark departure from these guidelines and will create confusion and uncertainty among borrowers and servicers.

In 2008, the Department of Housing and Urban Development (HUD) adopted a sensible approach to borrowers in bankruptcy when issuing Mortgagee Letter 2008-32. HUD reconsidered its prior exemption from loss mitigation programs for borrowers in bankruptcy, noting that the "Department understands that contact with debtor's counsel or a bankruptcy trustee does not constitute a violation of the automatic stay and that waiting until a bankruptcy is discharged or dismissed before offering loss mitigation may be injurious to the interests of the borrower, the mortgagee and the FHA insurance funds." HUD's Mortgagee Letter 2008-32 specifically requires mortgagees, upon receipt of notice of a bankruptcy filing, to send information to a consumer debtor's counsel 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. All of these actions required or recommended by HUD were consistent with the Bureau's initial consideration of this issue in the final 2013 RESPA Servicing Rule.

A slightly different approach was adopted by the Department of Treasury and the GSEs for the HAMP program. Borrowers in active chapter 7 or chapter 13 bankruptcy cases must be considered for HAMP if the borrower, the borrower's counsel, or the bankruptcy trustee (with the borrower's permission) submits a request to the servicer.[31] Servicers are not required to

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[28] *See* Section-by-Section Analysis, § 1024.39(b), 78 Fed. Reg. 10807 (Feb. 14, 2013).
[29] *See* Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 39(c)-1, effective Jan. 10, 2014.
[30] *See* Section-by-Section Analysis, § 1024.39(b), 78 Fed. Reg. 10807 (Feb. 14, 2013).
[31] *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.

proactively solicit these borrowers for HAMP when they are debtors in active bankruptcy cases. However, nothing in the HAMP guidelines prohibits a servicer from providing debtors in bankruptcy or their attorneys with information about loss mitigation options or suggests that providing such information would violate bankruptcy law. In addition, the guidelines for these programs provide that a debtor whose bankruptcy case no longer in 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.[32] Once again, these guidelines are consistent with the flexible approach initially taken by the Bureau in the final 2013 RESPA Servicing Rule.

Unlike these guidelines, the complete exemption from the early intervention requirements set forth in new section 1024.39(d) encourages servicers to adopt a "hands off" policy for consumers in bankruptcy. Servicers are likely to interpret the exemption as a ban on contacting borrowers in bankruptcy, even if that was not intended by the Bureau. Even worse, servicers will likely construe the exemption as an interpretation of bankruptcy law, one that wrongly concludes that early intervention contacts with a borrower or a borrower's attorney are impermissible, even though the Bureau has said it is not intending to construe bankruptcy law. If allowed to go into effect, it will cause servicers to question whether they should comply with conflicting program requirements, such as HUD's requirement to proactively solicit borrowers in an active bankruptcy case by providing loss mitigation information to the borrower's attorney. The Interim Final Rule takes away the authority and discretion given to servicers in the 2013 RESPA Servicing Rule to adapt early intervention notifications in a manner that would be consistent with loss mitigation programs and the Bankruptcy Code.

B. If an Exemption is Retained, It Should be Limited to the Live Contact Requirement.

If the Bureau determines that some form of an exemption should be retained, it should be drafted more narrowly to exempt servicers from only the live contact requirement in section 1024.39(a). The Bureau has not cited, and we are not aware of, any case in which a servicer has been held to have violated either the automatic stay or the discharge injunction by simply providing a debtor written informational materials about the availability of loss mitigation options. In fact, it is inconceivable that providing a purely informational notice in compliance with section 1024.39(b), and which does not contain any additional language seeking collection of a debt, could ever under any circumstances be held to violate bankruptcy law. We urge the Bureau to limit any exemption solely to the live contact requirements set forth in section 1024.39(a) when the borrower is a debtor in an active bankruptcy case.

C. If the Bureau Determines That the Blanket Exemption Should Be Retained, Official Bureau Interpretation Section 1029.39(d)(1) Should Be Deleted.

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[32] *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. *See also In re* Tincher, 2011 WL 2650569, at *3 (Bankr. D. S.C. July 5, 2011) ("This directive makes clear that debtors who file bankruptcy were intended to be eligible for HAMP post-bankruptcy, without being required to reaffirm their mortgage debt."); *In re* Bellano, 456 B.R. 220 (Bankr. E.D. Pa. 2011) (refusing to reopen bankruptcy to file reaffirmation involving HAMP modification based in part on HAMP directive).

If the Bureau determines that the blanket exemption should be retained, the Bureau should remove in its entirety the Official Bureau Interpretation section 1029.39(d)(1) that was issued with the Interim Final Rule. This Interpretation, like its counterpart for the periodic statement rule, covers matters that extend beyond the scope of new section 1024.39(d), by applying to events occurring when the borrower or a co-obligor is not in an active bankruptcy case. Other scenarios involving a borrower who has completed a bankruptcy case should not be addressed until the Bureau has had an opportunity to further study of relevant issues after notice and comment.

For example, comment 39(d)(1) - 2(ii) provides that compliance with the early intervention requirements is not required if any portion of the mortgage debt is discharged in bankruptcy. As discussed earlier, this fails to recognize that many consumers file chapter 7 for non-mortgage related reasons, continue to maintain payments after receiving a discharge, and do not reaffirm discharged mortgage debts because of the discharge injunction exception provided in § 524(j) of the Bankruptcy Code. In addition, as mentioned earlier, all of the government sponsored loan modification programs require that a borrower who has received a chapter 7 discharge and not reaffirmed the mortgage debt must be considered for loss mitigation options. Thus, comment 1029.39(d)(1) - 2(ii) is inconsistent with the policies of these loss mitigation programs and the Bankruptcy Code.

In addition, comment 1029.39(d)(1) - 3 dealing with joint obligors is too broadly drafted and does not take into consideration the differences between chapter 7 and 13 cases. This section provides that if there are joint obligors on a mortgage, the exemption applies if any of the borrowers is in bankruptcy. An example is given of a husband and wife who jointly own a home, stating that "if the husband files for bankruptcy, the servicer is exempt from complying with § 1024.39 as to both the husband and the wife." If the husband in this example filed a chapter 7 bankruptcy case, the automatic stay in his case does not apply to his spouse or any other joint obligors as there is no co-obligor stay in chapter 7. The Interpretation would prevent the wife in the example provided by the Bureau from receiving information about loss mitigation options even if the husband filed a chapter 7 case years after the couple were separated or divorced and the husband's participation is not required to complete the loss mitigation application. As the Bureau's apparent rationale for adopting the exemption is based on potential stay violations, which we believe is erroneous even in chapter 13 cases, this Commentary provision should be deleted or at a minimum redrafted so as to apply only when one of the joint obligors files a chapter 13 case in which the co-obligor stay under section 1301 of the Bankruptcy Code is applicable as to the non-filing obligor.

III. The Bureau Should Not Force Consumers to Choose Between Their FDCPA Rights and the Benefits of the Bureau's Servicing Rules. [Section § 1024.39 – Early Intervention and Section § 1026.20(c) – Payment Change With Rate Reset]

The Bureau is proposing to exempt servicers who are debt collectors under the Fair Debt Collection Practices Act (FDPCA) from the requirements of Reg. X, the early intervention provisions of the Bureau's servicing rule, when the borrower has exercised her rights under the

FDPCPA to have the debt collector cease communications.[33] The Bureau is also exempting servicers who are FDCPA debt collectors from the requirements of Reg. Z § 1026.20(c), the notice of a rate reset when there is also a payment change associated with the rate reset,[34] when the homeowner has exercised her rights under the FDCPA cease communication provisions. While the Bureau is exempting servicers from these two notices required by regulation, servicers must still provide substantially related notices that have direct statutory parallels, such as the notice of an initial rate change required by Dodd-Frank.

We are grateful that the Bureau has been careful not to opine on the reach of the FDCPA. The Bureau's servicing rulemaking under Regulations X and Z should not be used to limit judicial interpretation of what activities are covered debt communications under the CFPB. However, there should not be an explicit carveout from the servicing requirements for loans on which the debtor has requested that the debt collector stop debt collection activities.

The CFPB put these servicing provisions in place in the belief that they would help borrowers understand the status of their loans and the options available to them, and thus potentially avoid or cure default. Servicers do not need to be excused from providing the reset notices with important information to homeowners out of unsubstantiated fear of litigation risk. Some version of the rate reset notices required by Reg. Z § 1026.20(c) has been in Regulation Z since 1987. We are unaware of any FDCPA litigation involving the sending of rate reset notices. Servicers who are careful to send only mandated notices in compliance with the Bureau's forms are unlikely to face any litigation risk. The reset notice is distinguishable from debt collection communications because it is sent to all homeowners, not just those who are behind in their payments. The early intervention notice also is distinguishable because it is, by definition, sent pre-collection as an effort to avert the need for collections.

Moreover, in many circumstances, borrowers issue a cease-communication letter under 15 U.S.C. § 1692c(c) and later, or sometimes simultaneously, require all further communications be sent to an attorney under 15 U.S.C. § 1692c(a)(2). In those situations, where the borrower has clearly authorized communication with an attorney as to the status of the debt, there is no reason not to require the servicer to provide all relevant notices to the attorney.

The elimination of the Reg. X § 1024.39 and Reg. Z § 1026.20(c) notices is likely to confuse borrowers who do exercise their cease-communications right under 15 U.S.C. § 1692c(c). This is particularly true for the notice of a rate reset coupled with a payment change. While the CFPB has exempted servicers from providing this crucial notice to borrowers—that the terms of their mortgage are changing—the statutory requirement that servicers provide borrowers notice of the first rate adjustment, whether or not it is coupled with a payment adjustment, remains intact. Thus, borrowers are likely to have received a notice advising them of a rate change, and may well assume that their rate and payment remains unchanged in the absence of the subsequent notice. From a borrower's perspective, there is no meaningful distinction between the content of the two notices, and few borrowers are likely to understand that a cease-communication letter means they lose their right to be told of subsequent rate and payment adjustments while being told of an initial rate change. While these subsequent rate reset

[33] 78 Fed. Reg. 62,998 (Oct. 23, 2013).
[34] 78 Fed. Reg. 62,998, 62,999 (Oct. 23, 2013).

notices may well be seen by consumers as continued attempts to collect on the debt, the CFPB should treat all TILA-mandated disclosures equivalently, whether required by regulation or statute. The CFPB could, to allay any concerns about consumer confusion, require that such notices, when they are sent after a cease contact letter has been received, must state that the servicer is providing information that may be important to the homeowner and will continue to honor the homeowner's request to cease other communications to the homeowner.

Servicers who are debt collectors under the FDCPA should absolutely be forbidden to resume debt collection communications without the consumer's express consent. But a form letter advising that the homeowner may contact HUD-certified housing counselors is unlikely to be interpreted by most borrowers as the type of debt collection that they meant to stop with their cease-communications letter.

The proposed CFPB carveouts may actually result in fewer consumers exercising their rights under the FDCPA in order to keep the flow of information they will need when they get back on their feet. It would be better for the consumer to have the right to the information and the protection § 1692c(c) gives them from other debt collection communications. In many cases, consumers will wish to continue loss mitigation discussions with the servicer and receive current information about the interest rate on the loans. The CFPB's rule forces consumers to choose: either stop annoying phone calls and lose the home to foreclosure or continue to accept all harassing phone calls and have all available loss mitigation options open to them. A middle road is suggested by *Clark v. Capital Credit & Collections Servs., Inc.*[35] and an FTC Advisory Opinion:[36] creditors receiving cease-communication notices may not request payment and may not continue telephoning the homeowner, but they may comply with other regulations and respond directly within the scope of a consumer's inquiry.

We see no reason to exempt servicers who are FDCPA debt collectors from providing homeowners with mandated information about available loss mitigation options and neutral (and free) third-party housing counseling services. A consumer who has requested a cease to debt collection communications will want and needs information on how to mitigate the debt. Additionally, while the subsequent rate reset notices have some slight potential to be interpreted as ongoing debt collection, these notices should be provided. The debt collector should also reaffirm in both instances that it will continue to abide by the consumer's cease-communication request. And the CFPB should protect borrowers' rights under the FDCPA by acknowledging the rationale of *Clark* and the FTC Advisory Opinion: the homeowner's right to be free from harassing phone calls is not trumped by limited non-collection contact, particularly when initiated or requested by the homeowner.

IV. The Bureau Should Require Early Disclosure for All Dwelling-Secured Loans.

The Bureau proposes to require that the statutorily mandated counseling prior to entering into a high cost, closed-end loan that is not covered by RESPA be done after the HOEPA advance look disclosures are sent. The Bureau's rationale is sensible: in order to be effective, counseling should be done with the disclosures in hand and no statute requires provision of

[35] 460 F.3d 1162 (9th Cir. 2006).
[36] Anderson, FTC Advisory Opinion (June 23, 2009).

disclosures prior to the advanced look HOEPA disclosures for this limited class of loans.[37] The Bureau recognizes that three days is precious little time and encourages lenders to provide the HOEPA advance-look disclosures early. But the Bureau has available to it a better solution: requiring early disclosure for all dwelling-secured loans.

While the statute exempts high-cost loans from the Bureau's general authority to make additions to disclosure requirements,[38] nothing prevents the Bureau from using that authority to require that estimated disclosures under TILA be provided on all loans secured by a principal dwelling subject to TILA. This would bring in all closed-end, non-RESPA loans, high cost or not, into the early disclosure regime, and would improve comparability of loan products and reduce regulatory complexity. Additionally, the timing language applicable to the HOEPA advance look disclosures in 15 U.S.C. § 1639(b)(1) provides that the disclosures "shall not be given less than 3 business days prior to consummation of the transaction." This language sets a floor on what the Bureau may require—no less than 3 business days—but does not set a ceiling. Indeed, the language specifically authorizes that disclosures may be made in advance of 3 day limit. The Bureau is free to use its broad authority to provide for better coordination between the statute's counseling and disclosure provisions.

V. The Bureau Should Clarify that Loans Secured by Manufactured Homes Deemed Real Property Under State Law Are Subject to RESPA Even When the Loan Is Not Secured by Land.

As noted in the previous section, the Bureau is proposing to draw distinctions about the timing of the HOEPA counseling requirement based on whether a loan is subject to RESPA. If the Bureau retains this distinction, it is very important that the Bureau not treat loans for manufactured homes as not subject to RESPA when RESPA actually applies. The issue arises with respect to loans that are secured by manufactured homes but not by the land on which the home sits. Contrary to some suggestions in the Bureau's proposal, these loans *are* subject to RESPA if the manufactured home itself is treated as real estate under state law.

RESPA applies to manufactured homes in either of two circumstances:

a) The home is already located or will be located on land and the lender will have a lien on that land. Here RESPA applies regardless of whether the manufactured home itself is titled as personal or real property under state law because the land itself is considered real property.
b) The home itself is titled as real property under state law *regardless* of whether the lender has a lien on the land on which the home sits.

Despite clear language in both the Act and Regulation Z that both these transactions are covered, the CFPB, like HUD before it, sometimes appears to fail to appreciate that the second situation is within the scope of RESPA. This may stem from a lack of understanding that in a

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[37] 78 Fed. Reg. 62,993, 63,000 (Oct. 23, 2013).
[38] 15 U.S.C. § 1604(a).

large and growing number of states, a manufactured home itself can be classified as real property under state law even though the home is located on rented land.39

RESPA applies to “federally related mortgage loans.” According to the Act:

> the term “federally related mortgage loan” includes any loan (other than temporary financing such as a construction loan) which—
>
> (A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property . . . .[40]

The reference to condos and coops is intended to be a nonexhaustive list of examples, as is made clear by the “including” language.

Regulation X’s definition of “federally related mortgage loan or mortgage loan” encompasses the same broad scope as the statutory definition but elaborates on it with an additional example:

> Federally related mortgage loan or mortgage loan means as follows:
>
> Any loan (other than temporary financing, such as a construction loan):
>
> (i) That is secured by a first or subordinate lien on *residential real property*, including a refinancing of any secured loan on residential real property upon which there is either:
>
> (A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or
>
> (B) Located or, following settlement, will be placed using proceeds of the loan, a *manufactured home* . . . .[41]

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[39] *See, e.g.*, Arizona, Ariz. Rev. Stat. Ann. § 33-1501; Oregon, Or. Rev. Stat. § 446.626; Fla. Stat. §319.261; Idaho Code Ann. §§ 63-304(2), 63-305(1); Iowa Code § 435.26A; Mont. Code Ann. § 15-1-116; N.H. Rev. Stat. § 477:44; N.C. Gen. Stat. § 105-273(13); Or. Rev. Stat. § 446.626; S.C. Code § 56-19-510; Tex. Occ. Code Ann. § 1201.2055 (Vernon); Utah Code Ann. § 70D-1-20; Vt.. Stat. Ann. tit. 9, § 2603 (b); Wash. Rev. Code §§ 65.20.020, 65.20.040; and Wis. Stat. §101.9203. See also Uniform Manufactured Housing Act (2012) Uniform Law Commission.

[40] 12 U.S.C. § 2062(1).

[41] 12 U.S.C. § 1024.2 (b) (emphasis added). The term “manufactured home” is defined by reference to “HUD regulation 24 CFR 3280.2.” *Id.*

The preliminary language in this definition establishes that a security interest in "residential real property" is sufficient in and of itself to qualify a loan as a "federally related mortgage loan." Manufactured homes that are classified as real estate under state law are "residential real property" whether are not the loan is also secured by land. The regulation goes on to specify certain types of refinance loans—including certain refinance loans on residential real property on which a manufactured home is located--that meet the definition of "federally related mortgage loan," but the "including" language in the regulation makes it clear that these are non-exhaustive examples. Inclusion of these homes located upon land secured by the loan does not exclude manufactured homes which are themselves real property and clearly within the initial broad definition of any loan that is secured by a first or subordinate lien on residential real property .

It is also important to note that RESPA and Regulation X also include specific exemptions, such as loans secured by agricultural land, vacant land, or properties of 25 acres or more.[42] The list of exemptions does not include manufactured homes titled as real property.

Nevertheless, the Department of Housing and Urban Development misinterpreted RESPA as applying to manufactured homes "only if the manufactured home is located on real property [read "land"] on which the lender's interest is secured by a lien."[43] The CFPB appears to have adopted this misinterpretation as well.[44]

We encourage the CFPB to formally reject HUD's misinterpretation and inappropriate exclusion of some manufactured homes from RESPA's scope. The manufactured homes most likely affected by this misinterpretation are homes placed on leased land, on land owned by a family member, or on land that the homeowner already owned and did not wish to mortgage. In a large and growing number of states, a manufactured home itself can be classified as real property under state law even though the home is located on rented land. Such homes are eligible for the same mortgages as condos, coops, or single-family dwellings that are built on-site. But this misinterpretation of RESPA prevents those consumers from getting the protections and disclosures mandated by RESPA. Properly interpreted, a large and growing number of manufactured housing loans are covered by RESPA and subject to both its disclosure requirements and the timing requirements of 15 U.S.C. § 1638(b)(2).

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[42] 12 U.S.C. § 2606; Reg. X § 1024.5(b)(1) and (4).

[43] Dept. of Housing and Urban Development, FAQs About RESPA for Industry (undated), available at http://portal.hud.gov/hudportal/documents/huddoc?id=faqsjuly16.pdf.

[44] See CFPB's RESPA Narrative Exam Procedures, which state that RESPA only applies in the manufactured home context to loans secured by a lien on residential real property "upon which" a manufactured home is located or is to be constructed, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.consumerfinance.gov%2Ff%2F201308_cfpb_respa_narrative-exam-procedures.pdf&ei=rjSOUtySA_K-sQTJp4EY&usg=AFQjCNGwHvsnj1t0PFSumiJ4Yoz0IhpYig&bvm=bv.56988011,d.cWc&cad=rja.