COMMENTS
to the
Office of the Comptroller of the Currency

regarding

12 CFR Part 191

Docket ID FFIEC–2014–0001

79 Fed. Reg. 107 (June 4, 2014)

by the
National Consumer Law Center
on behalf of its low-income clients

September 2, 2014

The National Consumer Law Center ("NCLC"),[1] on behalf of its low-income clients, submits these comments on regulations regarding preemption of state due-on-sale clauses in response to the Office of the Comptroller of the Currency's (OCC) request for the public to identify regulations that are outdated, unnecessary, or unduly burdensome for insured depository institutions. As noted in other comments filed by our organization, while the OCC is posing this question in order to comply with the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the broader and more important question is where regulations should be improved to better protect consumers, small business and the market. Stronger consumer protection regulations could have saved consumers, financial institutions, and the entire economy billions of dollars by averting the recent mortgage foreclosure crisis--far more than compliance with the regulations could ever cost.

The regulations in 12 CFR Part 191 preempt state restrictions on the exercise of due-on-sale clauses by all lenders, whether Federally- or state-chartered. Section 191.5(b) prohibits lenders from exercising a due-on-sale clause upon certain kinds of transfers listed in the subsection. We strongly support maintaining these protections. Loans should not become due and payable upon such occurrences as the creation of a subordinate lien or the creation of a security interest in household goods.

The focus of our comments, however, is on the importance of maintaining protections for successors in interest, including those who obtain their interests through transfers described in subsections (iii), (v) and (vi) of 12 CFR § 191.5(b). These exempt transfers include any transfer by devise, descent, or operation of law upon the death of a joint tenant; any transfer to a relative resulting from the death of a borrower; any transfer where the spouse or children of the borrower become an owner of the property; any transfer resulting from a divorce decree, legal separation agreement, or incidental property settlement agreement; and any transfer into an inter vivos trust in which the borrower remains a beneficiary and occupancy of the property does not change. Current protections for these homeowners against exercise of due on sale clauses should be retained. In addition, as discussed below, additional protections are needed to ensure continuity of homeownership, where possible, after transfer.

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[1] The **National Consumer Law Center**® (NCLC®) is a non-profit Massachusetts corporation specializing in low-income consumer issues, with an emphasis on consumer credit. Since 1969, 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 Alys Cohen and Sarah B. Mancini.

For older homeowners, the death of a spouse or long-term partner is both a foreseeable and potentially life-shattering event. Frequently, the death of a spouse or long-term partner results in loss of income and financial disruption. With a two-income household reduced to one, the surviving homeowner frequently needs a mortgage modification – particularly if the couple was struggling financially before one of the partners died. Children and other heirs may also find themselves in need of a modification: perhaps they moved in to care for the aging borrower, with the understanding that the house would be theirs, or perhaps the family resources were always pooled towards a family homestead. In any event, the death of the homeowner can precipitate a financial crisis as well as an emotional one. Unfortunately, mortgage servicers routinely refuse to modify the loan or even provide basic loan information after transfers like these where the successor homeowner was not the original borrower on the note.

Facing the same struggle are spouses who receive title to the marital home through a divorce decree or legal separation agreement and who were not originally a borrower on the loan. Although they reside in the home, and often have jointly owned it with a spouse for many years, these homeowners will often be told that they cannot be approved for a loan modification.

Servicers offer a number of reasons for why they cannot communicate with successor homeowners about the mortgages secured by their homes or evaluate them for modifications of those mortgages. Servicers sometimes cite due-on-sale clauses in the mortgage contracts and alleged restrictions on assumption of mortgage loans. A successor is often told that she cannot apply for a loan modification to reduce her payment because she is not the borrower, and that she cannot become the borrower because she is not "qualified" to assume the loan or because the loan is in default. The servicer's refusal is often baffling to homeowners who want only to keep paying their bills and stay in their homes. Grieving homeowners find themselves confronting a bureaucratic maze.

The OCC should maintain the existing exemptions from due-on-sale clauses for these successors. In addition, the OCC should clarify in the regulations implementing Garn-St Germain that servicers must recognize the assumption of the mortgage by a successor pursuant to an exempt transfer under 12 CFR § 191.5(b), regardless of default status of the loan and without additional credit screening. Implicitly, by prohibiting the servicer from exercising the due-on-sale clause, Garn-St Germain requires servicers to recognize the assumption of the mortgage by these successors. The Fannie Mae Single Family Servicing Guide, § 408.02, recognizes this reality: "Generally, the servicer must process these exempt transactions without reviewing or approving the terms of the transfer." But the lack of regulations clearly stating that a successor has the right to assume the loan and apply for a loan modification in connection with a Garn-exempt transfer make invocation of the successor's rights under Garn-St Germain a torturous route.

Furthermore, the OCC should require servicers to provide successors with information about the loan and to evaluate successor homeowners for loan modifications under applicable programs prior to requiring a formal assumption of the loan. Such requirements would allow homeowners to make an informed decision as to the risks and benefits of assuming the loan. The need to assume the mortgage in order to achieve a loan modification puts the homeowner in a catch-22: without the assumption, the servicer may not allow the homeowner to get a loan modification that makes the loan affordable, but without a loan modification, a homeowner risks incurring personal liability on a debt she cannot afford. Requiring homeowners to assume the loan before evaluation for a loan modification forces homeowners to take a gamble in the dark and provides no benefit to lenders. Therefore, the OCC should clarify in its regulations implementing the Garn-St Germain Act that servicers must provide loan information and evaluate loan modification applications from any successor pursuant to an exempt transfer described in 12 CFR § 191.5(b).

Amending the existing rules to be clear in requiring these protections for successors in interest will serve the goals of the EGRPRA review process. Rules that do not fully implement existing law are by definition outdated and contribute to regulatory uncertainty that burdens regulated entities. Providing regulated entities with a more thorough regulatory framework would allow them to minimize their compliance costs.

Thank you for the opportunity to submit these comments.