SUPPLEMENTAL COMMENTS
to the
Office of the Comptroller of the Currency

regarding

12 CFR Part 191

Docket ID FFIEC–2014–0001

80 Fed. Reg. 79724 (Dec. 23, 2015)

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

March 21, 2016

The National Consumer Law Center ("NCLC"),[1] on behalf of its low income clients, submits these comments to supplement our submission on September 2, 2014, 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to the Office of the Comptroller of the Currency's (OCC) request for the public to identify regulations that are outdated, unnecessary, or unduly burdensome for insured depository institutions.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the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the question of whether regulations are outdated or burdensome should necessarily entail considering how regulations could be updated or improved to better protect market participants and fulfill the goals of the statutes they implement.

The regulations in 12 CFR Part 191, implementing the Garn-St Germain Act, 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, and we ask the OCC to clarify the legal import of these restrictions on the exercise of a due-on-sale clause.

We supplement our original comments on this issue because recent reports from homeowners and their advocates around the country confirm the ongoing need for clarity regarding the rights of successors who acquire their interest in a home pursuant to a transfer described in 12 C.F.R. § 191.5(b).[2] In particular, successors who become owners of homes through the death of a family member, divorce or separation agreement, or transfer to a spouse or child of the borrower continue to face stonewalling by mortgage lenders. These successors find themselves in a catch-22: they are told that they cannot obtain a loan modification or communicate with the servicer about the account to avoid foreclosure

[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 Sarah Bolling Mancini and Alys Cohen.

[2] *See* NCLC's forthcoming report, *Snapshots of Struggle: Saving the Family Home after a Death or Divorce* (March 2016), scheduled for release on March 23, 2016. It will be posted at http://www.nclc.org/issues/snapshots-of-struggle.html.

because they are not a borrower on the loan, but they are simultaneously told that they cannot become a borrower because they are not "qualified" or because the loan is in default. In making these arguments, servicers point to the due-on-sale clause and claim that it restricts assumption of the loan without the lender's approval.

This type of claim is precisely the kind of conduct Garn-St Germain's provision for "exempt transfers" was enacted to prevent. Congress believed that after these kinds of intra-family transfers, blocking a new homeowner's assumption of the existing mortgage would be "inequitable."[3] Therefore, although the statute generally authorized enforcement of due-on-sale clauses and preempted state laws to the contrary, it specifically barred lenders from enforcing due-on-sale clauses after an exempt transfer.

The legislative history makes clear that in restricting due-on-sale clauses, Congress was allowing assumptions. Congress repeatedly referred to loans with enforceable due-on-sale clauses as "not assumable" and to loans without such enforceable clauses as "assumable."[4] While the regulations that the OCC adopted to implement Garn-St. Germain did not use the terms "assumable" or "non-assumable," the likely reason is that this language was considered unnecessary because of the universal recognition of the equivalency between a lender being unable to enforce a due-on-sale clause and being required to recognize the transferee's assumption of the loan.

However, in recent years lenders have become confused on this point. They argue, even when they know the due-on-sale clause to be unenforceable because the transfer was through a death or divorce, that the successor may not assume the loan because it is not "assumable" or because any assumption would require the successor to go through underwriting.

This is flatly wrong under Garn-St Germain, for the reasons discussed above. Fannie Mae acknowledges that after a Garn-exempt transfer, "[u]nless the previous borrower requests a release of liability, the servicer must process [these] exempt transactions without reviewing or approving the terms of the transfer."[5] And in 2014, the Consumer Financial Protection Bureau clarified that its qualified mortgage and ability to pay rules do not apply to

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[3] *See* S. REP. NO. 97-536, at 25 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3074–79.

[4] *See* S. REP. NO. 97-536, at 20-21 (stating that the market players who benefited from state law restrictions on due-on-sale clauses were existing homeowners who could charge a premium to a buyer who wanted to take over that "assumable" loan), at 22 (describing the "window period" as designed to alleviate any unfairness to people who acted in reliance on state laws restricting due-on-sale enforcement and believed they were taking out an "assumable" loan).

[5] Fannie Mae Single Family Servicing Guide, § D1-4.1-02.

an assumption after a Garn-exempt transfer, since the assumption of the debt is not used to acquire the property, but rather post-dates the transfer of ownership.[6]

This matters for successor homeowners because if they decide to remain in the home and continue making the payments, generally they want to be treated as a borrower. They want to have the clear right to receive information about the loan, ensure that their payments are applied correctly, verify that payments are timely made out of the escrow, and when needed, apply for a loan modification or repayment plan. These successors are not asking for the original borrower or the borrower's estate to be released from liability (and indeed, such a request would enable a lender to impose a creditworthiness review); they merely want to have their right to assume personal liability for the debt recognized, when they so choose.

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 permit an assumption of the mortgage by these successors. Congress made no provision allowing lenders to perform a credit check on these protected homeowners or otherwise review their assumption. In contrast, during the three year "window period" after enactment of Garn-St Germain during which states' restrictions on due-on-sale clauses continued to apply, lenders were permitted to impose "customary credit standards" as a condition of an assumption.[7] Indeed, the only requirement the Garn implementing regulations currently place on a protected successor who assumes a mortgage is the continuance of pre-existing mortgage insurance.[8] But the lack of regulations clearly stating that a successor has the right to assume the loan after a Garn-exempt transfer make invocation of the successor's rights under Garn-St Germain exceedingly difficult. The OCC should clearly set out this right in the regulations and make it privately enforceable by successors, so as to promote compliance.

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[6] Application of Regulation Z's Ability-To-Repay Rule to Certain Situations Involving Successors-in-Interest, 79 Fed. Reg. 41631-01 (July 11, 2014).

[7] *Compare* 12 U.S.C. § 1701j-3(c)(2)(A) (providing that during the window period, lenders could refuse to honor assumptions for transferee homeowners who do not meet "customary credit standards," even if the due-on-sale clause would be otherwise unenforceable due to state restrictions), *with id.* § 1701j-3(d) (providing that due-on-sale clauses are unenforceable for nine categories of transfers without any provision for credit qualification).

[8] 12 C.F.R. § 191.5(c) (2015). *See also* Sarah Bolling Mancini and Alys Cohen, *Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information after a Death or Divorce*, 43 Pepp. L. Rev. 345, 377-83 (2016), available at http://digitalcommons.pepperdine.edu/plr/vol43/iss2/.

Servicers are uncertain about what Garn's prohibition on the exercise of a due-on-sale clause means for transferees in the Garn-protected categories. Clarifying 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, contribute to regulatory uncertainty, and are therefore burdensome. Providing regulated entities with a clearer and more complete regulatory framework allows them to minimize compliance costs. In the case of the regulations under Garn-St Germain, it would also allow countless homeowners recovering from the trauma of a family breakup or the death of a loved one to become obligors on the mortgage loans secured by their homes, furthering the purpose of the statute to protect such individuals who want to maintain the family home.

Thank you for the opportunity to submit these supplemental comments.