September 9, 2024

Submitted via email to: **2024-NPRM-MortgageServicing@cfpb.gov**

Comment Intake – Mortgage Servicing
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW, Washington, DC 20552

Re: Docket No. CFPB-2024-0024; RIN 3170-AB04

To Whom It May Concern:

The Housing Policy Council[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposed rule Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties ("Proposal" or "Proposed Rule") under the Real Estate Settlement Procedures Act ("RESPA") and its implementing regulation, Regulation X.[2]

HPC has long advocated that the loss mitigation framework and certain related provisions of Regulation X need substantial revisions and updates, as evidenced by the multiple adjustments and adaptations implemented over the last 10 years.[3] We support the CFPB eliminating the complete/incomplete loss mitigation application framework and related provisions, as this structure has led to an unnecessarily complicated and confusing process for borrowers and servicers. Further, the heavy reliance on temporary exceptions to the anti-evasion requirement, put in place since the rule was promulgated, is a strong indication that revisions to the rule are warranted. Additionally, we support the Proposed Rule's continued recognition of and deference to investor requirements regarding eligibility criteria and features of loss mitigation programs. However, we have substantial concerns regarding certain provisions of the Proposal that will not "streamline mortgage servicing," but, in fact, may complicate the loss mitigation process and impose costs that far outweigh the benefits.

One of the Bureau's main purposes in amending Regulation X is to create "strong incentives for servicers to review borrowers for loss mitigation assistance quickly and accurately."[4] The Proposal includes several specific references to policy designs intended to motivate servicers. It is in both the

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[1] The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers; mortgage, hazard, and title insurers; and technology and data companies. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families. For more information, visit www.housingpolicycouncil.org.
[2] Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X, 89 Fed. Reg. 60204 (July 24, 2024).
[3] See HPC Letter to the CFPB RFI on Mortgage Servicing, November 28, 2022. Also, see HPC Letter to the CFPB on CFPB's Upcoming Rulemaking on Regulation X Loss Mitigation Rules, November 29, 2023.
[4] 89 Fed. Reg. 60204, 60205.

servicer's and borrower's best interests to provide loss mitigation assistance quickly and accurately.[5] However, we are concerned that the Bureau has ignored and omitted incentives to motivate borrowers to engage in loss mitigation. Instead, perhaps unintentionally, the Bureau's proposed rules may discourage borrowers from engagement with their servicer during the loss mitigation process.

For example, by engaging early and providing the necessary information and documentation (if any), a borrower has a much better chance of accessing a solution that is minimally disruptive. Such action should be encouraged, and the Proposal should include rules that motivate borrowers to communicate with their servicers as soon as they know that they need help. In contrast, the Proposal establishes timeframes that may contribute to a prolonged loss mitigation review period, which will increase the chances that a borrower becomes ineligible for a loss mitigation solution. In addition, some provisions of the Proposal, such as the determination notice provisions, increase the complexity of the process and are likely to add to, not reduce, borrower confusion. In this rulemaking, the Bureau should establish incentives for both servicers and borrowers, reduce complexity, and minimize borrower confusion. We ask the Bureau to provide a clear and well-defined roadmap for the loss mitigation process that servicers can communicate to borrowers, so that borrowers know what they need to do and by when they need to do it.

Our comments are based on the order in which the provisions appear in the Proposal. While we have separated our comments by the individual sections of the Proposal, many of our comments are interconnected. For example, our comments on the protections provided during the loss mitigation review cycle and our comments on the measures that permit a servicer to conclude that cycle are directly related. We ask the Bureau to consider these comments holistically. As detailed in this letter, HPC's comments on the Proposal are as follows:

1) HPC is generally supportive of the proposed changes to the early intervention written notice, but some refinements are necessary to be more effective and efficient;

2) HPC supports the early intervention and notice requirements for borrowers in forbearance with one change on timing and one clarification;

3) HPC supports the Bureau removing the complete/incomplete application framework;

4) Commencement of the loss mitigation review cycle should only occur once the borrower has demonstrated a commitment to pursue loss mitigation;

5) The fee prohibitions exceed the CFPB's statutory authority;

6) As proposed, the loss mitigation review cycle could be unnecessarily lengthy and would be subject to abuse, which is not in the interest of borrowers and servicers;

[5] We believe that the last 10 years since the publication of Regulation X show that servicers have been compliant with the regulation and have worked to provide borrowers with Loss Mitigation as soon as feasibly possible.

7) The proposed loss mitigation determination notice provisions are unnecessarily prescriptive, overly burdensome, and likely to cause borrower confusion;

8) The Bureau must clarify its intent and purpose in the amendments regarding duplicative requests for loss mitigation assistance;

9) HPC supports the Proposal's continued recognition of and deference to investor guidelines, and we ask for one clarification regarding retention and non-retention loss mitigation;

10) The concepts on limited English proficiency are highly problematic and require a more substantive evaluation before proposing and finalizing;

11) The amendments to the appeals process need substantial refinement;

12) Consistent with our comments on the right to appeal, there should not be a right to appeal an unsolicited/blind offer;

13) Any changes in credit reporting must be consistent with applicable law and the Bureau's authority;

14) The CFPB's cost/benefit analysis is completely inadequate and must be revised and reissued for comment; and

15) The CFPB should provide clear transition rules for loss mitigation applications and/or assistance requests that are under review as of the implementation date.

1. HPC is generally supportive of the proposed changes to the early intervention written notice, but some refinements are necessary to be more efficient and effective.

The Proposed Rule expands the content of the early intervention written notice to include the name of the owner/assignee, a brief description of each type of loss mitigation that is generally available from the owner/assignee, and a phone number and website where the borrower can obtain information on the loss mitigation programs that may be available from the owner/assignee. HPC is supportive of the intent of the changes. However, while some of the provisions make sense, other elements need refinement and additional clarity.

HPC is supportive of the revised requirement that the notice include a brief description of each type of loss mitigation program that is generally available from the investor. The current rule requires a "brief description of examples of loss mitigation options that may be available" and the Proposal would require a "brief description of each type of loss mitigation option that is generally available" from the owner/assignee. We understand that the change is in the number of programs that must be listed, not in the level of detail that must be provided. We appreciate the proposed commentary that the servicer

"may provide a generic description of the option without providing detailed descriptions of each program."[6]

We do not oppose the explicit identification of the owner/assignee of the loan, although we think it makes more sense to identify the party that dictates the availability of loss mitigation programs. However, we request clarity – specifically that in the instances of the owner/assignee being a trust, a servicer be allowed to provide a general identification of the type of owner/assignee and not the specific name of the trust. There is no consumer benefit to identifying the name of the trust in this notice, and providing this suggested flexibility would reduce the operational costs for servicers.

The Bureau must clarify what information must be included on the website that is required in both the early intervention notice and the determination notice. The Proposal states that these notices must include a website "to access a list of all loss mitigation options that may be available from the owner." We read this to mean that the website must include a brief description of each type of loss mitigation program, like the language in the notices, but the Proposal is vague and ambiguous. We ask the Bureau to clarify that the standard for the information on the website be the same as that in the notices. To require otherwise would place a substantial burden on the servicer without a countervailing benefit to borrowers. In addition, the final rule should stipulate that a servicer may also comply by referencing a website operated and maintained by the owner/assignee. Allowing for this alternative method would provide the borrower with the required information, prevent duplication of effort, and immediately accommodate updates made by the owner/assignee to their information or programs.

2. HPC supports the early intervention and notice requirements for borrowers in forbearance with one change on timing and one clarification.

The Proposed Rule makes three changes regarding early intervention for borrowers in forbearance: (1) eliminating early intervention communications while a borrower is performing in a forbearance; (2) establishing contact and notice requirements at the scheduled end of the forbearance period; and (3) requiring the resumption of the early intervention live contact/written notice, should the borrower go delinquent after the next payment due date. Of note, at least 30 days but no more than 45 days before the scheduled end of the forbearance, the servicer must contact or make good faith efforts to establish live contact with the borrower. The servicer must provide the borrower with the date the forbearance is scheduled to end and the availability of loss mitigation programs, if appropriate. The servicer must also send a written notice with the date the borrower's forbearance ends and the other information required in early intervention written notice.

HPC supports the Bureau making it clear that, while a borrower is performing in a forbearance plan, no matter what type of forbearance, no early intervention contact – live or written – is required. HPC has long believed that requiring any intervention contact during forbearance only causes borrower confusion without any benefit to the borrower. We appreciate the Bureau recognizing this and adjusting the rule to require more common-sense contact with the borrower.

HPC also supports the proposed requirement for the servicer to notify the borrower before the end of forbearance regarding next steps and actions for loss mitigation programs. This aligns with HPC's previous recommendations regarding modifications to the notice requirements to provide borrowers

[6] Proposed official interpretation 1024.39(b)(2)(iii)-1.

with appropriate information at the point in time when they need to act. We also support that the timing for the contact is the “scheduled end” of forbearance, as that alleviates compliance issues when a borrower unexpectedly cancels forbearance. To provide some flexibility for servicers without diminishing the borrower benefits, we recommend that the time frame to establish live contact be either “at least 30 days before the scheduled end of forbearance” or “at least 30 days but no more than 60 days before the scheduled end of forbearance” rather than the proposed window of at least 30 days but no more than 45 days before the scheduled end. The proposed 15-day window is unnecessarily narrow to attempt to establish live contact, particularly for borrowers who have been on long-term forbearances.

Additionally, the final rule should include guidance on how to comply with the timing requirements for contact near the scheduled end of forbearance for short-term forbearance. Some forbearance periods are as short as 30 days (e.g., VA). Under the Proposal, servicers would be unable to comply with the timing requirements (at least 30 days but no more than 45 days before the scheduled end) for these short-term forbearances. We ask the Bureau to provide guidance on how to comply with these timing provisions for short-term forbearances, or alternatively, to only require such notification when the forbearance reaches a certain number of months (e.g., 3-6 month term).

3. HPC supports the Bureau removing the complete/incomplete application framework.

The Proposed Rule would remove the complete/incomplete application framework, remove the 5-day notice requirement, and make other conforming changes. HPC is supportive of removing this framework, as it has proven to be unsustainable and necessitated Bureau exceptions and exceptions to those exceptions.

As we have noted in previous communications to the Bureau, there is substantial evidence that the complete/incomplete application framework frustrates the purpose of the Regulation X mortgage servicing provisions, creating borrower confusion and unnecessary impediments to assistance. Piecemeal updates and the over reliance on the exceptions to the anti-evasion provision are unsustainable and demonstrate a clear indication that revisions to the rule are necessary to create a more long-lasting and durable regulatory framework. The complete/incomplete application concept, when coupled with the anti-evasion clause, has proven to be inconsistent with the loss mitigation options that have been in use for the last decade.

One area of concern remains, as we have previously stated, in replacing this framework, the Bureau must establish clear triggers for consumer protections to begin and end, consistent with investor guidelines and eligibility criteria. Unfortunately, the Bureau’s proposal does not set forth a set of operationally feasible triggers. Our comments elsewhere in this letter (see Sections 4 & 6) focus on refinements and modifications we recommend to better define the beginning and end of the protections and to clarify deference to investor guidelines and eligibility criteria.

4. Commencement of the loss mitigation review cycle should only occur once the borrower has demonstrated commitment to pursue loss mitigation.

Under the Proposal, the loss mitigation review cycle (and the related protections) commence when the borrower (or their authorized representative) requests loss mitigation assistance from the servicer. Such a request is defined to mean any oral or written communication, occurring through any

usual and customary channel for mortgage servicing communications, whereby a borrower asks a servicer for mortgage relief. The Bureau states that a request for loss mitigation assistance is to be construed broadly and includes, but is not limited to, any communication whereby: (1) the borrower expresses an interest in pursuing a loss mitigation option; (2) a borrower indicates that they have experienced a hardship and asks the servicer for assistance with making payments, retaining their home, or avoiding foreclosure; or (3) in response to a servicer's unsolicited offer of a loss mitigation option, a borrower expresses an interest in pursuing that or any other loss mitigation option.

HPC supports the concept of the review cycle beginning when the borrower actively pursues loss mitigation assistance from the servicer. However, the trigger needs to be defined unequivocally, with practical, evidence-based measures. We respectfully disagree with the CFPB's statement that servicers should "presume that a borrower who experiences a delinquency as defined in §1024.31 has made a request for loss mitigation assistance when they contact the servicer unless they clearly express some other intention." This default presumption is ill-conceived, and will lead to borrower confusion, misunderstanding, and actions that the borrower is ill-prepared to effectively complete. This concern is bolstered by the Bureau's experience during COVID-19, when the agency criticized servicers for presuming that delinquent borrowers should be enrolled in forbearance.[7] If it was wrong to presume that a borrower needed forbearance, it is similarly inappropriate to presume that a borrower who experiences delinquency has made a request for loss mitigation assistance.

Instead, we reiterate our suggestion that the review period begin when a borrower *both* requests assistance from the servicer *and* affirmatively commits to take the steps necessary to pursue such assistance, if additional borrower action is necessary. Fundamentally, borrower engagement is the key element to successful loss mitigation, and the framework must motivate and establish incentives for borrowers to actively engage in the process. As a result, merely expressing an interest, as proposed, should not be sufficient.

Alternatively, we believe that the GSEs have an effective process that could serve as an effective model – the Quality Right Party Contact ("QRPC") process that provides a framework by which servicers must establish communication with the borrowers "about resolution of the mortgage delinquency."[8] We believe that a reasonable place for the Bureau to attach consumer protections is when the servicer and the borrower have established communication about the resolution of the mortgage delinquency and the borrower has affirmatively agreed to pursue mortgage assistance from the servicer. This would clear up confusion about the methods and modes of communication. It would also provide evidence of the borrower's affirmative commitment to engage in loss mitigation and would help differentiate between valid, actionable requests for assistance and general inquiries for information about loss mitigation or routine complaints. We note further that this could allow a borrower to engage with the servicer through multiple channels – phone, web, chat, even documentation and paper application mailed to a specified address – to communicate their intent to seek resolution of the delinquency. This would therefore provide an accurate and identifiable starting point for the servicer and a consistent expectation for the borrower with respect to foreclosure protection.

[7] CFPB Supervisory Highlights, COVID-19 Prioritized Assessments Special Edition, Issue 23, Winter 2021.

[8] *See, e.g.*, Fannie Mae, Servicing Guide, D2-2-01, Achieving Quality Right Party Contact with a Borrower ("The purpose of QRPC is to: determine the reason for the delinquency and whether it is temporary or permanent in nature, determine the occupancy status of the property, determine whether or not the borrower has the ability to repay the mortgage loan debt, educate the borrower on the availability of workout options, as appropriate, and obtain a commitment from the borrower to resolve the delinquency.").

We appreciate that the Proposal allows for servicer-identified points of entry for borrowers to request loss mitigation assistance, so long as the points of entry are reasonably accessible and understandable to borrowers. We ask that the Bureau commentary be revised to further explain the "usual and customary" channels by providing examples of what would be deemed acceptable to meet this standard. For example, the commentary could state that if a servicer establishes an address, phone number, website, Email, or chat feature for borrowers to indicate their interest in loss mitigation assistance and posts this information on its website and periodic statements, the Bureau will deem such channels as usual and customary. This approach would be consistent with the approach used for notices of errors under §1024.35(c) and is particularly necessary here if protections are to apply earlier in the process.

Based on our reading, the Bureau expects that the loss mitigation review cycle, and related protections (cessation of foreclosure advancement and imposition of fee prohibitions) would begin immediately upon a borrower's request for loss mitigation assistance. In addition to more narrowly defining the borrower's request to include his/her affirmative commitment to engage with their servicer as they pursue loss mitigation, we also ask the Bureau to acknowledge that some of these protections cannot be implemented instantaneously. For example, servicers will sometimes be required to notify the foreclosure attorney, who will then need time to notify courts or suspend foreclosure actions. Compliance with the Proposal should be based on the establishment of and adherence to reasonable policies and procedures; one example of a reasonable procedure is to grant the protections within two business days of the borrower's agreement to pursue assistance.

5. The fee prohibitions exceed the CFPB's statutory authority.

The Proposal seeks to expand the types of protections provided to the borrower during the loss mitigation review period. The protections that would be triggered include a total suspension of all foreclosure activity, including no first filing/notice, no foreclosure sale, and no advancing the foreclosure process. In addition, during the loss mitigation review cycle, no fees may accrue to the borrower's account, other than the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract.

a. *The Bureau must clarify the "no advancing foreclosure" protection.*

The final rule must acknowledge that state law and court rules or actions may affect the ability of servicers to refrain from "advancing" the foreclosure process. Specifically, the rule should state that a servicer cannot advance the foreclosure process during the loss mitigation review cycle, *to the extent permissible under applicable laws and judicial rules and actions*. Recognizing the operation of these laws and rules is imperative to enable servicers to comply with both Regulation X and their obligations under other applicable laws and rules. For example, it is our understanding that the following jurisdictions require that foreclosures be restarted rather than put on hold: Alabama, DC, Georgia, Maryland, Michigan, Minnesota, Missouri, Rhode Island, Tennessee, Texas, and Virginia. The Proposed Rule would effectively require that a servicer cancel foreclosures in these jurisdictions in order to prevent foreclosure from advancing. Yet, the related fees for the canceled foreclosure would be properly added to the loan balance (at least those incurred before the borrower's request) and, if the loss mitigation review cycle did not result in a loss mitigation option, so too would the restarted foreclosure fees – yielding no benefit to the borrower. Because foreclosures in these states cannot simply be put on hold,

the Proposed Rule should provide servicers with sufficient time to take the appropriate steps to stop foreclosure activity in these jurisdictions. Further, the rule should provide an exception for foreclosure actions that are necessary to preserve the statute of limitations.

Additionally, the CFPB should explicitly exempt actions taken prior to commencement of foreclosure, such as issuing breach letters or pre-foreclosure notices, as well as interim foreclosure actions, such as mediation or settlement conferences from the requirement to refrain from advancing the foreclosure process. Unfortunately, the Proposal makes clear that advancing the foreclosure process by engaging in these efforts – actions that, like loss mitigation, are aimed at keeping borrowers in their homes – would be prohibited. This is a policy mistake. In some instances, mediation is required by the court and state. A third-party mediator is involved who oversees the process and advocates reaching a solution that is beneficial to the borrower, including loss mitigation review. Those parties are more attuned to the borrower needs and thus can make the best determination as to whether a solution is available. If they determine that foreclosure should proceed and advise the court of such determination, servicers must follow their determination. Instead of prohibiting these resolution efforts, the Bureau should create a bright-line rule where all mediation, or settlement type meetings are permissible. Our view is clear that mediation could be beneficial to borrowers by resolving delinquencies and decreasing costs for borrowers and should therefore be allowed. Lastly, the rule should provide an exception for borrower-requested foreclosure activity. While rare, servicers have encountered situations in which borrowers seek to continue or complete the foreclosure process. Servicers should therefore be able to advance the foreclosure process upon request from the borrower.

b. *The Bureau does not have the authority to prohibit fees during the loss mitigation review cycle.*

Neither the Consumer Financial Protection Act ("CFPA") nor RESPA, except in specific, explicit instances unrelated to this Proposal, grant the CFPB the authority to limit or prohibit fees the servicer may charge. As we discuss more fully in our response to the Bureau's recent request for information on closing costs, the Bureau may regulate fees only if Congress has explicitly and unambiguously established that authority for the agency.[9] While RESPA does establish some prohibitions for originators, settlement service providers, and servicers regarding pricing for certain aspects of a mortgage transaction, it does not permit the prohibition of fees as proposed by the Bureau.[10] The Proposal includes no discussion of the Bureau's legal authority to impose such a prohibition. The Bureau must reconsider this part of the Proposal in light of the clear legal constraints on its authority.

If the Bureau instead elects to prohibit fees, it must limit any such prohibition to servicer fees, such as late fees and stop payment fees, and exclude third party costs and accrued interest from the scope of the fee prohibition. Unlike servicer fees, third party costs such as property valuations and property preservation costs are pass-through charges that the servicer incurs to meet investor and/or state requirements, or to maintain vacant properties and avoid community blight. The servicer cannot be expected to waive recovery of and absorb these costs on behalf of other parties. Further, the Bureau may not interfere with the terms of the contract between borrower and lender/servicer by limiting the

[9] HPC Comment Letter to CFPB on Request for Information Regarding Fees Imposed in Residential Mortgage Transactions, August 1, 2024.
[10] Other comment letters express concerns with the Bureau's RESPA / Reg X authorities as well, including the Mortgage Bankers Association, American Bankers Association, and Bradley law firm.

accrual of interest during the loss mitigation review cycle. In addition, the Bureau should clarify that any such fee prohibition does not apply to fees or costs incurred, but not yet billed, prior to the beginning of the loss mitigation review cycle. Often the servicer will incur fees and costs, but there will be a delay in receiving a bill for such fees, such as attorneys' fees. If the Bureau finalizes this provision, in spite of its lack of legal authority to do so, the scope should be explicitly limited to servicer fees incurred during the loss mitigation review cycle.

6. **As proposed, the loss mitigation review cycle could be unnecessarily lengthy and would be subject to abuse, which is not in the interest of borrowers and servicers.**

The Bureau is proposing a new "loss mitigation review cycle" to delineate the period beginning when the borrower makes a request for loss mitigation assistance from the servicer (provided the request is made more than 37 days before a foreclosure sale) and ending when the loan is brought current *or* one of two procedural safeguards is met. In the absence of resolving the delinquency, at least one procedural safeguard must be achieved before the servicer is permitted to file first notice or advance the foreclosure process; the safeguards include: (1) there are no remaining loss mitigation programs for which the borrower is eligible or (2) the borrower is unresponsive for at least 90 days, despite the servicer's efforts to contact the borrower. A loss mitigation review cycle continues while a borrower is in a temporary or trial loss mitigation period, such as a forbearance or modification trial payment plan, and the loan has not yet been brought current.

As proposed, the loss mitigation review cycle could be very lengthy, much longer than the Bureau seems to envision or intend and could dissuade borrowers or their representatives from resolving the delinquency expeditiously. In other words, as designed, this new period when the borrower is permitted special protections, does not properly motivate borrowers to actively engage in loss mitigation. Without proper incentives in place for borrowers to engage with servicers quickly or meaningfully, it is likely that borrower delinquencies will be prolonged unnecessarily. As delinquencies extend and missed payments accrue, borrowers will no longer be eligible for certain loss mitigation products and will be more limited in their options to resolve the delinquency (for example, to qualify for GSE Repayment Plans and GSE Payment Deferrals, a borrower cannot be more than 6 months delinquent at the time of evaluation). Meanwhile, the servicer would continue to incur costs and advance missed payments to investors as well as possibly face a strict foreclosure statute of limitations (e.g., New York). As a result, this Proposal could very well lead to an increase in future mortgage rates, as a way to compensate servicers and investors for the increased servicing losses they will incur. Such a burden would likely affect those least able to afford it, including low- and moderate-income borrowers.

a. The "unresponsive borrower" framework is problematic and could allow the loss mitigation review cycle to continue indefinitely.

As proposed, the 90-day lack of contact measure is not explicitly defined, which could result in an interpretation that would allow the loss mitigation review cycle to continue indefinitely. First, the Proposal does not define the type or substance of the contact that would qualify. For example, it's possible that the borrower could contact the servicer via an online chat feature about an increase in their escrow payments due to property tax increases (completely unrelated to loss mitigation), and that could be deemed to be contact under this Proposal. If the Bureau finalizes this safeguard, we recommend that it be narrowly defined to make clear that the Bureau means: a) that there has been no

contact via a usual and customary mortgage servicing channel specifically designated for loss mitigation; and b) to qualify as contact, the borrower communication must be related to loss mitigation and the borrower must commit to the actions required to pursue assistance. Additionally, even if there has been borrower contact through mortgage servicing channels related to loss mitigation, we propose that the review cycle will conclude 30 days from the date on which the servicer requested information from the borrower in order to complete their loss mitigation review. A model of this alternative is in the "intent to proceed" provision of the Massachusetts 35B notice process.[11] Under that provision, a borrower must affirmatively respond to the servicer of their "intent to pursue" a loss mitigation option and provide the requested information within 30 days of receipt of an equivalent to an early intervention notice.

We also believe that the 90-day time period is unnecessarily lengthy. If there is some level of communication that does not result in borrower action to pursue loss mitigation, this timeframe is too long and will not benefit borrowers. The Bureau based the 90-day proposal on data from unprecedented emergency rules and using this data as a baseline to define a sufficient time period to determine whether a borrower is unresponsive in a regular servicing environment is not appropriate. This 90-day proposal contrasts with the existing rule, under which a reasonable date by which the borrower must submit the documents and information necessary to make the loss mitigation application complete is 30 days (see official commentary 41(b)(2)(ii)-1). HPC previously suggested that the no-contact end to the review period would be that there was no responsive contact with the borrower for a period of 30 days following a deadline for borrower action (e.g., submission of information/documentation). We urge the Bureau to adopt a framework under which protections would end if the servicer has requested information from the borrower, and the borrower has failed to provide the requested information within 30 days, rather than the proposed 90 days of no contact as this is more reasonable, properly motivates borrower action, and is more directly tied to the Bureau's objective to deliver loss mitigation to the borrower quickly (as highlighted in the commentary regarding servicer incentives).

b. *The "no remaining loss mitigation programs" safeguard may encourage investors to offer fewer loss mitigation programs.*

HPC is concerned about lack of clarity regarding when and how a servicer can determine that no available loss mitigation programs remain. The Final Rule should be explicit that if the servicer has offered a loss mitigation option and the borrower has not accepted it within the applicable timeframe, the loss mitigation review cycle ends. The review cycle also would end if the borrower has been evaluated for all available loss mitigation options, has been denied for such options, and the applicable appeal period has expired, or the appeal has been exhausted. However, under the proposed framework, "a borrower may decline an offer for a specific type of loss mitigation and seek first to learn what other options exist. The servicer may evaluate the borrower for additional options and the borrower may later decide that they would like to accept the offer that they previously declined." If borrowers are able to decline an offer and at a later and unspecified time inform a servicer that they want to accept the offer they declined, it complicates and extends the loss mitigation review cycle. In response, investors may limit the number of loss mitigation programs or amend existing programs, which could have unintended consequences for borrowers and the industry more broadly.

[11] Mass. Gen. Laws ch. 244, § 35B, https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleIII/Chapter244/Section35B.

The Bureau should also distinguish "home retention" loss mitigation options from "home disposition" loss mitigation options. Without this distinction in the rule, some could misconstrue the Bureau's intent and claim that the foreclosure process cannot commence or proceed, because disposition options, like deed in lieu of foreclosure, may be considered to be continuously available. The new rule framework could ostensibly be interpreted to require that the "dual tracking" prohibition remains in place when these programs are available. If the Bureau does not distinguish that the borrower protections only apply to home retention loss mitigation options, investors could and should eliminate or significantly restrict the time period in which home disposition options like "short sales" and "deeds in lieu of foreclosure" are available because otherwise they will have to keep in place a foreclosure hold indefinitely. This outcome would harm both borrowers and investors, directly contrary to the concept of loss mitigation.

7. The proposed loss mitigation determination notice provisions are unnecessarily prescriptive, overly burdensome, and likely to cause borrower confusion.

Under the Proposal, if a servicer receives a request for loss mitigation assistance more than 37 days before a foreclosure sale and makes a determination to offer or deny any loss mitigation assistance, the servicer must promptly provide the borrower with a notice in writing stating that determination. The servicer must include several customized pieces of information in this notice, much of which will be highly specific to the borrower, including, but not limited to: (1) the specific reason(s) for the servicer's determination to offer or deny each such loss mitigation option; (2) the key borrower-provided inputs, if any, that served as the basis for the determination; (3) a telephone number, mailing address, and website where the borrower can access a list of the non-borrower provided inputs, if any, used by the servicer in making the loss mitigation determination; and (4) a list of all other loss mitigation programs that may remain available to the borrower, if any, including a clear statement describing the next steps the borrower must take to be reviewed for those loss mitigation options.

A servicer must not deny a request for loss mitigation assistance solely because the servicer lacks required documentation/information not in the borrower's control. However, a servicer can deny on that basis if it regularly has taken steps to obtain the required documentation/information and is unable to obtain such for at least 90 days and provides the borrower with a written notice. The written notice must state that if the servicer receives the documents/information within 14 days of providing the written notice, the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly.

We appreciate and support providing borrowers with necessary information at critical points in the loss mitigation process. However, the regulation should state explicitly that the servicer is not required to send multiple notices, even if the borrower is evaluated for loss mitigation on a sequential basis. The servicer may transmit a denial for all programs for which the borrower was considered. Otherwise, multiple notices, along with multiple appeals timelines will overlap and cause unnecessary confusion for borrowers. For example, for the VA home retention loss mitigation process, if a servicer is required to send a determination notice after a decision has been made about each individual program, a servicer would potentially need to send eight determination notices in one loss mitigation review

cycle.[12] That would create unnecessary confusion for borrowers. The rule must clarify that servicers may send one determination notice that includes the details concerning the review of all available programs, similar to the way the rule functions today.

As drafted, the determination notices will require substantial tailoring for each borrower's circumstances. For this determination notice to be most effective, the Bureau should narrow the focus to a clear and concise written explanation of the basic information a borrower needs to understand the outcome of the loss mitigation evaluation and what actions they must or can take, depending on the determination. The servicer could also make available further information via a contact channel, to address specific questions.[13]

Further, servicers should only be required to provide reasons for loss mitigation denials, not offers. The reason for an offer is that the borrower qualifies for the offer based on all investor eligibility criteria. Requiring servicers to list every eligibility criterion (which could easily involve more than a dozen criteria for each product) is overly burdensome, would add more length to an already long and complex determination notice, and likely lead to borrower confusion. The rule should also affirm that the servicer will have and present the appropriate information from a list, such as a set of standard reasons for the determination and/or the key borrower-inputs that served as the basis for that loss mitigation determination. The reason for an offer is that the borrower qualifies for the offer based on the investor/owner guidelines, so the types of reasons are consistent across cases and can be presented in a list, with a "check-box" or other type of standardized approach.

In addition, the distinction between key borrower-provided inputs and other information used in a loss mitigation evaluation is not clear. Such a distinction is not used by investors, and there's no definition or understanding as to what is "key" nor what is an "input." For example, a critical component for many options is an evaluation of the type of hardship. Is that a key input? Is that a borrower-provided input? Is a borrower's oral statement that they can afford to repay the missed payments in a lump sum and can afford the current monthly mortgage payment a key input? The Proposal creates unnecessary ambiguity, and there should be no distinction between types of inputs, whether from the borrower or another source and whether or not they are "key." Such distinctions are more appropriately determined by investor guidelines and requirements, if such distinctions are even necessary.

Furthermore, the Bureau's 1022(b) analysis of the increased detail required in determination notices is inaccurate and incomplete.

> The increased detail required in determination notices may not substantially affect costs per notice given that servicers already have the required information on inputs underlying their determinations, other loss mitigation options available, and forbearance terms and duration. However, including this information may increase questions and/or alleged errors from borrowers, particularly if numerical inputs are difficult to understand or do not align with other common usages of the same term…[14]

[12] *See, e.g.*, VA Servicer Handbook M26-4, Appendix F: VA Home Retention Waterfall, https://benefits.va.gov/WARMS/docs/admin26/m26_04/m26-4-appendix-f-va-home-retention-waterfall.pdf.

[13] The Bureau itself has acknowledged that the loss mitigation process is complex. *See, e.g.*, CFPB, Borrower Experiences with Mortgage Servicing During the COVID-19 Pandemic, p 21 (June 2024).

[14] 89 Fed. Reg. 60204, 60239.

This analysis fails to account for this new terminology and distinction on types and sources of inputs. It also fails to account for the potentially specialized nature of these determination notices. The Bureau admits that it does not have sufficient information to estimate the additional number of required notices.

Another concern with the excessive information required for this notice is identified by the Bureau itself; in the Proposal, the CFPB recognizes that “certain borrower-provided inputs constitute sensitive consumer information” and “it expects servicers and other financial institutions to take appropriate measures to protect consumer data.”[15] We agree that servicers are obligated to protect sensitive consumer information. The CFPB does not provide sufficient justification for putting this information at risk. Additionally, if the CFPB were to require separate notices or portals to access this information, the burden on servicers would be substantial, without any countervailing consumer benefit.

The Proposal would also require a servicer to include a telephone number, mailing address, and website where the borrower can access a list of the non-borrower provided inputs, if any, used by the servicer in making the loss mitigation determination. The Bureau finds that it does not have the information to estimate the increased costs to borrowers in requiring these determination notices, including the costs of developing and maintaining a website through which borrowers can access the required information. A better alternative is for the Bureau to simply allow a servicer to identify the appropriate channel for a borrower to utilize should they have questions or concerns.[16] Unlike many places where the Bureau provides “flexibility” where such leniency is not needed or desired (see LEP comments below), this is a place where flexibility actually will reduce costs and allow for servicers to adapt communication channels over time.

We also ask for some timing and timing-related clarifications. One, we request that the Bureau include guidance as to what it would consider “promptly,” and would recommend that if a servicer sends a determination notice within 5 business days of completion of the servicer determination/decision, such notice would be deemed prompt. Two, the Bureau should clarify that a forbearance extension is not a new loss mitigation determination, meaning the granting of an extension does not trigger a determination notice to be sent. We see no value in such a notice being sent under these circumstances, and it may cause borrower confusion. And three, similar to our comments regarding the “no borrower contact” measure that will permit the servicer to end the review cycle, the limitation on when a servicer can deny a loss mitigation request for assistance based on lack of documentation/information not in the borrower’s control is unworkable. The Proposal only allows the protections to end if a servicer has attempted to obtain the information from a borrower for at least 90 days – this is much too long a period and will lead to abuse and dramatic increase in costs. We recommend a similar timing as our proposal for the no borrower contact procedural safeguard (30 days). This 30-day period aligns with the current provision regarding loss mitigation denials due solely to missing information not in the borrower’s or servicer’s control (existing § 1024.41(c)(4)).

[15] 89 Fed. Reg. 60204, 60221.

[16] We additionally ask for clarity on the website requirements. We believe that any website requirements should be limited to general eligibility criteria, rather than individual borrower inputs.

8. **The Bureau must clarify its intent and purpose in the amendments regarding duplicative requests for loss mitigation assistance.**

Currently, a servicer must comply with §1024.41 for a borrower's loss mitigation application, unless the servicer has previously complied with this section for a complete loss mitigation application and the borrower has been delinquent at all times since submitting the prior complete application. This was designed, according to the Bureau, to "balance access to the consumer protections afforded by § 1024.41 with a recognition of the potential burden an unlimited requirement to comply with § 1024.41's requirements for any subsequent loss mitigation application could have on servicers."[17] Under the Proposal, a servicer must comply with the requirements of §1024.41 for a borrower's request for loss mitigation assistance during the same loss mitigation review cycle, unless the procedural safeguards have been met. The Bureau provides no substantive explanation as to why it is amending this provision, only that it is doing so to align the provision with the new proposed regulatory framework.

As proposed, this provision and the Bureau's intent are unclear. We do not understand how the provision would work in practice. If a borrower is already in or has already completed a loss mitigation review cycle without reinstating the loan, what benefit is there in the borrower asking for assistance and being re-evaluated, particularly if there has been no change in circumstances? If the servicer is in the process of evaluating a borrower for loss mitigation, what are the implications of the borrower requesting assistance again during the same delinquency cycle before the evaluation is complete? How does the Bureau envision this provision working with investor guidelines? There may be an unintended consequence of investors tightening eligibility criteria and imposing more restrictions.

If the Bureau intended this to be a non-substantive, conforming change, which we believe is the case, we ask the Bureau to clarify that point. Said differently, we recommend that the final rule preserve the framework under which a borrower would only be entitled to protections for one loss mitigation review cycle per delinquency cycle. If the borrower subsequently seeks assistance during the same delinquency cycle, servicers should be able to review them in accordance with their policies and investor guidelines, without protections reattaching.

9. **HPC supports the Proposal's continued recognition of and deference to investor guidelines, and we ask for one clarification regarding retention and non-retention loss mitigation.**

Investor guidelines, including the hierarchy of loss mitigation programs and associated rules, will continue to determine whether any loss mitigation program is available and whether the borrower qualifies for a given program. The proposed changes provide servicers the flexibility to review a borrower for loss mitigation programs sequentially rather than simultaneously, although a simultaneous review would be permitted.

HPC appreciates and supports this continued recognition and deference to investor guidelines, which establish the eligibility criteria and documentation necessary for evaluations. Generally, investors require that a borrower be evaluated for one loss mitigation program at a time, and it is critical that Regulation X expressly recognize this.

[17] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 FR 72160-01, 72270.

In the 1022(b) analysis, the Bureau states that the "proposed framework would allow servicers to evaluate borrowers more quickly and would provide flexibility to the servicer so that the servicer would not need to review the borrower for non-retention options in instances where the borrower has indicated they would like to remain in the home."[18] HPC is very supportive of this distinction, and we have previously recommended such an option. We ask the Bureau to clarify the distinction between home retention and disposition options in the rule or in the official interpretations, as it is not clear as currently proposed.

10. The concepts on limited English proficiency are highly problematic and require a more substantive evaluation before proposing and finalizing.

We support the Bureau's efforts to provide borrowers with limited English proficiency ("LEP") access to language assistance. We have engaged and continue to engage with federal agencies' efforts to assist LEP borrowers, and we appreciate and support this ongoing work. Our member companies currently provide a wide array of language services to their borrowers.

The Bureau's 2021 statement ("2021 LEP Statement") on the provision of such services struck the right balance of providing helpful guidance while allowing necessary flexibility in how lenders and servicers implement these services.[19] Furthermore, that statement was a product of the Bureau's substantial engagement with stakeholders, including the consumer financial services industry and consumer and civil rights advocacy organizations.[20]

There are common sense and meaningful actions that could improve language access, like requiring servicers to provide oral interpretation services to borrowers upon request. However, the Bureau takes a different and flawed approach.

While there is no proposed rule text or official commentary to delineate the Bureau's proposed requirements, we surmise from the Bureau's press release and the preamble to the Proposed Rule that the Bureau seeks to establish a wide-ranging set of provisions related to serving borrowers with LEP, including requiring servicers to: (1) provide all customers with Spanish-language translations of certain written communications (regardless of language preference); (2) provide translation and oral interpretation services for certain written and oral communications in the requested language, for "servicer-selected languages"; and (3) offer translation or interpretation services for certain written and oral communications in languages the servicer "knows or should have known" were used in marketing to the borrower for that mortgage loan. The preamble indicates that the CFPB will not provide model translated notices, and servicers will be responsible for the accuracy of the translated notices and interpretation services.

We first discuss our procedural concerns and then the substance of the LEP concepts.

a. *The CFPB cannot finalize these concepts without first proposing regulatory text for notice and comment and performing a realistic cost-benefit analysis.*

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[18] 89 Fed. Reg. 60204, 60232.

[19] Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency, 86 Fed. Reg. 6306 (Jan. 21, 2021).

[20] 86 Fed. Reg. 6306, 6307-09 (detailing the Bureau's engagement with stakeholders over several years that resulted in this policy statement).

The lack of proposed text, commentary, and detail for these LEP concepts is unprecedented and very concerning. Without these details and the proposed text, the public cannot meaningfully comment and provide input on the Proposal. As the Bureau itself noted, "there may be multiple ways to structure the specific requirements…, which will vary based on the aspects of the proposed rule ultimately finalized."[21] It would be impossible for the public to anticipate and comment on each of the "multiple ways" the Bureau is considering structuring new language-related requirements that have never been a part of Regulation X. Additionally, the questions posed by the Bureau in the preamble show a lack of understanding of the size and scope of the issue the Bureau is trying to address. For example, the Bureau has questions on the capacity, availability, and accuracy of translations and interpretation services. The Bureau also is asking whether borrowers face difficulties in accessing translation or interpretation services. These are questions that should be posed in a request for information or advance notice of proposed rulemaking, not a proposed rule. Based on these questions, it is clear the Bureau lacks the information necessary to properly understand the scope of the perceived issue and propose a reasonably tailored solution.

The Bureau's cost-benefit analysis regarding the LEP concepts is inadequate. In prescribing a rule, the CFPA requires the Bureau to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[22] For example, the Proposal repeatedly references statistics related to "households" that speak non-English languages, but "households" is not the same as "mortgage loan borrowers." The Bureau recognizes that although the number of households with LEP "does not equate to the number of borrowers with limited English proficiency who have mortgages, let alone mortgages in distress, the CFPB has preliminarily concluded these estimates are representative of the scale of borrowers with limited English proficiency that could be impacted by the proposal."[23] The Bureau believes that data from the 2020 American Survey of Mortgage Borrowers supports such a conclusion. That survey found that, while 22 percent of respondents experiencing financial distress indicated that they speak a language other than English at home, only 6 percent of borrowers indicated that they speak another language at home and speak English less than "very well." The Bureau provides no rationale for drawing such a conclusion, and the Proposal does not contain data specific to mortgage loan borrowers beyond this survey conducted during the pandemic and specific to borrowers in financial distress. Also, the Bureau doesn't address the fact that the 2022 American Community Survey ("ACS") found that, among the 49.3 million households with a mortgage, only 1.9 percent (about 941,000) had heads of households who did not speak English proficiently.[24] We note that the Bureau seems focused on a population that speaks English "less than very well" while discounting the data on heads of household "who did not speak English proficiently." We find that the latter group is far more consistent with our understanding of Limited English Proficiency, and information from HPC members (some of the largest servicers in the country who have over 60 percent market share) who typically find that less than 3 percent of borrowers request language assistance, and of those, more than 95 percent request assistance in Spanish (one HPC servicer noted that less than .02 percent of borrowers requested language assistance for a non-Spanish language).

[21] 89 Fed. Reg. 60204, 60225.
[22] 12 U.S.C. § 5512(b)(2)(A)(i).
[23] 89 Fed. Reg. 60204, 60240.
[24] 2022 American Community Survey

Additionally, the preamble states that "almost one fourth of the population is estimated to reside in a household that speaks a language other than English" and "of those households, almost one fifth have limited proficiency in English."[25] According to the Bureau's own math, that means that, at best, the Bureau is using data that suggests that less than five percent (less than one fifth of less than one fourth) of households are LEP. In other words, the LEP concepts are meant to benefit, at most, five percent of households in the United States, and possibly much less, as households is not equivalent to mortgage borrowers (not to mention delinquent on their mortgage). Moreover, the servicer costs of implementing and maintaining these LEP concepts are extraordinarily high. The Bureau does not provide any estimates of costs that will be incurred, only that the LEP concepts "may impose new or additional costs on servicers."[26] We do not believe the CFPB has sufficiently accounted for the implementation and ongoing costs of these LEP concepts.

The Bureau's analysis also omits granular detail on the costs and benefits related to the specific ideas described. For example, the Bureau does not offer an estimate or analyze the limited size of the population of borrowers that would be served by the requirement to have translation and language services in five languages (in addition to Spanish), particularly considering servicers' costs to implement and maintain such services. For one HPC servicer that manages over 2.5 million loans, the fifth most common language other than English and Spanish is Korean, which is spoken by approximately 400 borrowers (which is less than .01 percent of all their borrowers). This finding is higher than expected based on information from the 2022 ACS that finds that Korean is the fourth most common language spoken at home by LEP households with a mortgage (only 26,941 households).[27] Assuming that 10 percent of mortgages seek loss mitigation help at some point during the life of the mortgage,[28] this means about 2,700 Korean-speaking LEP households who might need language help for loss mitigation. Providing complete loss mitigation assistance in a specific non-English language for fewer than 2,700 households across the country, or 400 borrowers out of 2.5 million loans for a particular mortgage servicer is cost prohibitive.

Additionally, the Bureau has not justified the costs that will be incurred in providing certain notices (written early intervention and loss mitigation determination) in Spanish to every borrower, nor has it offered its rationale for providing notices in a language the borrower has not requested. The Bureau states that Spanish-speaking households account for 13 percent of households in the U.S. Again, this data is not specific to mortgage borrowers, but one can reasonably conclude Spanish-language notices would be provided to far more borrowers than is necessary. By contrast, when faced with the idea of requiring every debt collection validation notice to include a Spanish translation of the disclosure required under the Federal Debt Collections Practice Act ("FDCPA")/Regulation F, the Bureau expressly declined to do so. "Mandating that every debt collector provide a Spanish translation of the disclosure is unnecessary for the majority of consumers, who are not Spanish speakers. Further, a mandatory translation could undermine the effectiveness of the other validation information disclosures."[29] The

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[25] 89 Fed. Reg. 60204, 60224.
[26] 89 Fed. Reg. 60204, 60241.
[27] 2022 American Community Survey
[28] The Mortgage Bankers Association delinquency index indicates a peak serious delinquency rate plus foreclosure rate of 10 percent in the aftermath of the Great Recession.
[29] Debt Collection Practices (Regulation F), 86 Fed. Reg. 5766, 5798 (Jan. 19, 2021) (Also note, "Moreover, the November 2020 Final Rule contained a targeted language access intervention on this topic. Pursuant to § 1006.18(e)(4) in that rule, debt collectors will be required to make the FDCPA section 807(11) disclosure in the same language or languages used for the rest of the communication in which the disclosures

Bureau's conclusion in its 2021 debt collection rule remains well-founded today – mandating Spanish-language notices for all borrowers is unnecessary and could undermine the effectiveness of other information.

Further, the Bureau has not considered any less costly, less burdensome alternatives that still provide the affected borrowers with the necessary resources. In fact, the Proposal only says that "a requirement to send both English- and Spanish-language communications to all borrowers *may* result in updates to software systems to create the Spanish version of the communications and *may* increase mailing costs for communications sent by mail if these require additional pages of text."[30] Stating that sending two complete sets of notices "may increase" mailing and software costs is a significant understatement and shows a lack of diligence by the Bureau in preparing a real cost estimate. For example, the Bureau could have easily surveyed the current cost of sending an early intervention notice, and then calculated the extra postage necessary to send twice as many pieces of paper through the mail. If the Bureau had done so, it would have found that every document being mailed will require at least twice the postage when most borrowers speak English and will not want or need the additional translation. Further, the Bureau seems to presume that servicers simply rely on software systems to generate translated written notices. This presumption does not take into account the cost of employing human translators to manually translate or interpret notices, verify the accuracy of translations, or some combination of the above. In the 2021 Regulation F rule, the Bureau expressly declined to mandate Spanish-language translation to all consumers as such an approach would result in "significant, industry-wide costs on both an upfront (implementation) and ongoing basis…. [T]he Bureau concludes that the costs of such interventions to debt collectors… would not outweigh the benefits to consumers because they would add undue complexity to the rule from an operational, compliance, and supervisory perspective."[31]

Of even greater concern, the Bureau has not recognized that the proposed loss mitigation determination notices will be highly specified to each borrower, and providing these in two languages, along with having them available in five other languages will result in a substantial implementation and ongoing cost for servicers, relative to the extremely limited benefit, as described above.

Under the Administrative Procedures Act ("APA"), the Bureau must address all key aspects of the problem to be addressed, including potential countervailing consequences of a proposed approach. The Bureau also must consider reasonable, less onerous alternatives to their proposed action.[32] There is no evidence that the Bureau has yet considered alternatives to most of the LEP concepts described in the preamble. "The CFPB recognizes that public input will help design an effective intervention, including potentially identifying additional relevant details or alternative approaches, and is eager to consider those suggestions as it drafts regulatory text."[33] The Bureau must consider alternative approaches before finalizing these LEP concepts, and it should reissue these as part of a proposed rule, with actual proposed regulatory text, with a discussion of such alternatives.

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are conveyed. Thus, if a debt collector provides a consumer a validation notice in Spanish pursuant to § 1006.34(e), the debt collector must include on that notice a Spanish translation of the FDCPA section 807(11) disclosure.)

[30] 89 Fed. Reg. 60204, 60243.

[31] 86 Fed. Reg. 5766, 5833-34.

[32] *See, e.g.*, Multicultural Media, Telecom & Internet Council v. FCC, 873 F.3d 932, 942 (D.C. Cir. 2017).

[33] 89 Fed. Reg. 60204, 60225.

b. *A more reasonable, cost-effective approach that would result in borrower benefit is to include in-language disclosures on certain loss mitigation notices describing that oral interpretation services and/or Bureau-provided translated notices are available upon request.*

The Bureau's LEP concepts are overly complicated and unnecessarily burdensome. A more cost-effective alternative that would meet the CFPB's goals would be to require servicers to include a phrase on certain notices required by Regulation X in the top five most-spoken languages identified in the ACS that notices and/or translation services in that language are available upon a borrower's written request.

There is very little benefit, particularly compared to the substantial burden, in requiring each servicer to identify a unique set of "top 5" languages, in addition to Spanish. Monitoring and determining the languages that meet the proposed criteria adds a substantial and ongoing burden on servicers, particularly given how few borrowers might be served in some of the top five language-categories, similar to the Korean language example provided above.

Additionally, servicer inconsistency in language choice could negatively affect a borrower's experience and actually introduce fair lending risks when servicing is transferred. For example, imagine a delinquent Minnesotan borrower who speaks Somali is served by a servicer where Somali is a top five language, but then the loan is transferred to a servicer where Somali is not a top five language. This will lead to inevitable borrower confusion and could make the loan unsellable. This is an inevitable consequence of the Bureau providing unwanted "flexibility" to servicers to identify their own languages. Instead, as further discussed in section (c) below, a more reasonable alternative is for the Bureau to select and translate documents/clauses for use by servicers in the top five languages (including Spanish) as determined by the ACS at a given point in time. Should those languages change, the Bureau could produce the additional translations.

c. *The Bureau should focus on language services and must provide model language for any required statement or notice.*

The Bureau must provide model language translations in each of the five languages identified in the ACS, upon which servicers may rely for compliance with any future rule. Specifically, the Bureau must provide the model clause stating that the notices and/or translation services are available in the applicable language upon written request, including instructions on how to submit such written requests, as well as the translated documents themselves.

Model language is critical for borrowers and servicers alike. The Bureau states that it is

> Not proposing specific model language for the translation and interpretation availability statements for several reasons. Regulation X currently provides flexibility to servicers to develop their own terminology and scripts to use for many of their required written and oral communications. The CFPB also recognizes that some servicers already provide these types of statements in certain of their written communications. To reduce implementation costs for those currently providing statements that would comply with

this Proposal, the CFPB has preliminarily determined servicers should have the flexibility to determine the terminology and phrasing for the statements.[34]

It is tempting to believe that flexibility would help reduce implementation costs, but flexibility in this instance will complicate matters. The benefits of "flexibility" will likely directly conflict with the Bureau's emphasis on the "accuracy" of these translations and "fairness" to borrowers. Accuracy is a standard best achieved by issuance of a single and uniform set of translations, rather than the multitude of variations that would be generated if each servicer is expected to develop their own, unique translated documents. It would be better for borrowers and much more efficient for the market for the CFPB to provide specific, consistent model language for the translation and interpretation availability clauses/statements and documents. To balance the benefits of servicer flexibility against concerns of consistency and accuracy in borrower communications, the CFPB should grant a safe harbor from liability for servicer usage of CFPB-provided model language. Such a safe harbor would encourage servicers to adopt the CFPB's language and promote industry-wide consistency in borrower communications and translations.

Providing translated model language is also consistent with other provisions of Regulation X. For example, 12 CFR § 1024.39(b)(3) provides that model clauses in appendix MS-4 may be used to comply with the requirements of §1024.39(b) (early intervention written notice). Paragraph §1024.39(b)(2) contains minimum content requirements for the written notice. As expressly noted in official commentary (see comment 1024.39(b)(2)-1), a servicer may provide additional information that the servicer determines would be helpful or which may be required by applicable law or the owner or assignee of the mortgage loan. These model forms reduce borrower confusion, and result in a consistent outcome/understanding for each borrower and servicer. The Bureau could and should adopt the same approach here.

Model language regarding the availability of the notice in other languages and interpretation services is also used effectively in other circumstances. Indeed, the Bureau itself has previously provided model Spanish language notices under other regulations. For example:

- The CFPB has crafted model Spanish language Loan Estimate and Closing Disclosure forms mortgage lenders can use in fulfilling their TILA/RESPA Integrated Disclosure obligations under Regulation Z.[35] Depending on the circumstances, use of the model forms – or a form that is substantially similar – is required by the regulation.[36]
- Looking beyond the mortgage context, under the CFPB's Remittance Transfer Rule, providers of remittance services must provide required disclosures in English, and in any other language "principally used … to advertise, solicit, or market remittance transfer services."[37] To help facilitate compliance, Appendix A provides Spanish language models of the required disclosures,[38] and the Official Interpretations note that "The use of appropriate clauses in making disclosures will protect a financial institution and a remittance transfer provider from liability under sections 916 and 917 of the [Electronic Funds Transfer Act], provided the clauses

[34] 89 Fed. Reg. 60204, 60227.
[35] 12 CFR Part 1026, Model Forms H-28(A) through H-28(J).
[36] 12 CFR §§ 1026.37(o)(3)(ii) and 38(t)(3).
[37] 12 CFR § 1005.31(g).
[38] 12 CFR pt. 1005, Model Forms A-38 through A-41.

accurately reflect the institution's EFT services and the provider's remittance transfer services, respectively."[39]

- In its 2021 Regulation F rule, the Bureau finalized a model validation notice that included a statement in Spanish that a consumer could use to request a Spanish-language validation notice.[40]

As the CFPB noted in a 2022 blog post ("2022 LEP Blog"),[41] the Bureau has published model translations of several other regulatory disclosures as well. Admittedly, not all of these provide safe harbors for their use. Still, they underscore that the Bureau recognizes the value of uniform translations and can help to promote consistency across the industry. These model translations span a number of regulatory obligations. Notably, this includes model Spanish clauses servicers may use in the Early Intervention Notice under Regulation X.

This approach is also consistent with that taken by regulators in other industries. For example, the regulations implementing Section 1557 of the Affordable Care Act, 45 CFR § 92.11, require that covered entities provide a notice of availability of language assistance services. The Department of Health and Human Services issued sample language for covered entities to use to comply and samples are provided in English and over 45 other languages. The Bureau should adopt a similar approach, requiring a similar availability of language statement and translation services and providing model language in English and other languages. Alerting borrowers to the resources available in this manner is a more effective way to support LEP borrowers.

For determination notices, which even in English are bespoke, and where we acknowledge model language will be challenging, instead of requiring word-for-word translations, we would advocate for the Bureau to adopt a standard that describes how a borrower may access additional oral interpretation services (such as by calling a phone number). This would allow enhanced language services broadly, without limiting the services to an arbitrary number of languages (only 5 + Spanish indicated in the preamble to the Proposed Rule).

This approach would also address the Bureau's own acknowledgment that loss mitigation processes are complex. In its Report on Borrower Experience with Mortgage Servicing During COVID-19, the CFPB concluded that "the complexity of processes for receiving help with payment difficulties may have created barriers to accessing loss mitigation for some borrowers, and these barriers may have been relatively higher for distressed borrowers with limited English proficiency."[42] Similarly, the preamble notes that "[b]orrowers who fluently communicate in English may have difficulty understanding some of this legal and financial text, and that difficulty may compound for borrowers with limited English proficiency. The increased difficulty in understanding this information may result in missed information or a lack of communication with the servicer if borrowers do not receive language assistance."[43] Based on this conclusion, we believe that the solution for LEP borrowers is oral language services, not line-by-line translated notices. As the Bureau notes, the loss mitigation processes are complex, and real time language services are the best avenue for helping LEP borrowers better

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[39] 12 CFR pt. 1005, Official Interpretation, Appendix A-2.

[40] 86 Fed. Reg. 5766.

[41] https://www.consumerfinance.gov/about-us/blog/support-spanish-speaking-customers-with-spanish-language-disclosures/.

[43] 89 Fed. Reg. 60204, 60224.

[43] 89 Fed. Reg. 60204, 60224.

understand these complexities. This is even more applicable in the context of local dialects within a country that may make a translation pointless and unhelpful.

The Proposal materially departs from the CFPB's past positions on effective assistance to LEP borrowers. These past positions are clearly articulated in the Bureau's 2021 LEP Statement and the 2022 LEP Blog and are consistent with the findings in the COVID-19 Servicing Report. Despite this clear articulation in the past, the Bureau fails to discuss these positions and does not provide a reasoned explanation for this significant change.[44]

If the CFPB does not provide translated model clauses, the CFPB must institute some protections for servicers who have reasonably relied on third party firms to provide accurate translation and interpretation services. The CFPB asks about accuracy of translations and interpretations, including whether there are bona fide errors that may occur that the CFPB should consider. In the alternative to making available model translations, which continues to be HPC's strong preference, the CFPB should deem a servicer to be in compliance if it employs reasonable policies, procedures, and diligence in selecting and using language and translation services providers.

d. *The Rule must be clear on the parameters of a borrower requesting language assistance.*

The CFPB does not provide enough detail or guidance on the parameters of a borrower request for language assistance. For example, to meet the APA, the future proposed rule must specifically state that the servicer is only accountable for a request that it receives directly during the loss mitigation review cycle (not those made to any previous servicer of the mortgage), and only for requests made through a channel/method reasonably designed by the servicer to accept such a request. We recommend that the rule identify the explicit forms of acceptable evidence the Bureau would rely upon to validate this type of borrower communication, such as the servicer communication record. If the Bureau expects translation/interpretation services to be provided for the life of the loan, (e.g., to future requests for loss mitigation assistance), the rule should explicitly state the obligation, which could be as simple as servicer confirmation of LEP status with each communication. Lastly, the rule should clarify how to treat co-borrowers, where one requests information in English while the other borrower requests information in another language.

e. *The marketing standard should be removed.*

The Proposal's requirement that, upon borrower request, a servicer must provide translation or interpretation services of certain written and oral communications for any language the servicer knows or should have known were used in marketing to the borrower for that mortgage loan (the "Marketing Standard") is overbroad, vague, unworkable, and will likely have a chilling effect on the mortgage market. We advocate that this concept be removed in its entirety.

i. <u>The Marketing Standard will effectively require servicers to support dozens, if not hundreds of different languages</u>.

Over 350 different languages are spoken in the United States. Some of these (e.g., Spanish) are spoken by large populations residing throughout the country. Many others (e.g., Italian, Finnish, Cajun

[44] *See, e.g.*, <u>Encino Motorcars, LLC v. Navarro</u>, 579 U.S. 211, 221 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."); <u>FCC v. Fox Television Stations, Inc.</u>, 556 U.S. 502 (2009).

French, Native Languages) are spoken in significant numbers, but tend to be more "clustered" in particular states or regions.

In a competitive mortgage market, loan originators have natural incentives to tailor marketing practices to reach these communities. Wherever a given language is spoken widely enough to create a business opportunity, one or more lenders are likely to market in that language. While a large, nationwide lender might reasonably conclude that the costs of marketing in Cajun French are not supported by the opportunity, a smaller lender who operates solely in Louisiana might view the situation differently.

Adopting a Marketing Standard would potentially require servicers to support any language that any lender may have used in marketing, regardless of the number of impacted borrowers. In the scenario above, a servicer would potentially need to support Cajun French, even if loans to Cajun French speakers make up only a tiny fraction of the servicer's overall portfolio.

This may be challenging in and of itself, but these challenges quickly multiply. While some servicers may service loans originated by only one or two lenders, most are servicing loans originated by many lenders. As the servicer takes on a bigger book of business, its portfolio expands to additional geographies and additional lenders, each of whom will have made their own choices about languages to include in its marketing. As a result, the Marketing Standard steadily increases the servicer's legal obligations. For a moderately-sized regional servicer, this could mean supporting dozens of languages. For large servicer that operates nationwide, it could mean hundreds.

ii. The Marketing Standard could have a chilling effect on lender outreach to LEP communities.

As noted above, if a given language is spoken widely enough to create business opportunity, it creates natural incentives for lenders to market in that language. This is a positive outcome: when lenders affirmatively engage LEP communities, it increases opportunities for those communities to access valuable financial services. As such, the ultimate goal of regulatory policy should be to encourage outreach and engagement with LEP individuals. We believe that the Marketing Standard was proposed with this goal in mind, but we have concerns that it could, paradoxically, *de*-incentivize such outreach.

As previously noted, the Marketing Standard will increase compliance costs, and could negatively impact the secondary marketing for loans and servicing rights. If any or all these negative impacts materialize, loan originators may feel pressure to simply discontinue non-English marketing entirely. Should that occur, the Bureau's proposal would have the opposite of its intended effect: rather than making *more* information available to LEP consumers, it would have instead led to those consumers receiving *less* information.

iii. The Bureau's stated rationale for the Marketing Standard conflicts with prior Bureau policy positions.

In the preamble, the CFPB states that it has preliminarily determined that marketing for a financial product in a language may falsely imply to a borrower that future communications regarding that financial product will also be available in that language, "regardless of any disclaimers that might be used." This preliminary determination is at odds with the CFPB's 2021 LEP Statement, which explicitly

recognized the use of disclosures to mitigate compliance risk (and, presumably, borrower confusion).[45] If the CFPB has since changed its position regarding the effectiveness of disclosures to mitigate borrower confusion, it should articulate a clear, reasoned basis for that change.[46] Disclosures are widely used in many industries to provide clarification and avoid borrower confusion, and it is unclear why the CFPB has indicated otherwise in the Proposal.

iv. <u>A uniform standard can be easily crafted by referring to other, more readily available data.</u>

As described above, the Marketing Standard is overly broad, difficult for servicers to track, and could have negative consequences for an efficient secondary market. Beyond that, however, it's simply unnecessary, as there are other indicators of borrower language preference that are not only more readily available, but also more reliable.

In 2022, Fannie Mae and Freddie Mac released a new "Supplemental Consumer Information Form" ("SCIF")[47], that allows applicants to note their preferred language. The SCIF includes checkboxes for the five most common non-English languages in the United States (Spanish, Chinese, Korean, Tagalog and Vietnamese), as well as a free form "Other" space for additional preferred languages.

Lender usage of the SCIF was originally optional, but under subsequent announcements from FHFA and HUD, lenders are now required to provide it to all applicants for GSE and FHA loans. Any applicant responses must be logged by both the lender and servicer, shared with the GSEs or HUD, and transferred to any subsequent servicer.

These requirements were expressly intended to give lenders and servicers access to accurate language information, which they could use to assess and meet borrower needs. For example, when FHFA first announced that usage of the SCIF would be mandatory, its accompanying press release noted:

> The purpose of the SCIF is to collect information about the borrower's language preference, if any, … so lenders can better understand borrower needs during the home buying process. …
>
> "Collecting language preference and housing counseling information provides mortgage applicants with an additional method to inform lenders of their needs, enabling the industry to more fully respond to the nation's growing diversity," said FHFA Acting Director Sandra L. Thompson. …
>
> "The CFPB welcomes the FHFA's announcement today. As those lenders and financial companies that already collect the language preference of applicants and borrowers know, this information allows lenders to serve their customers better. …" said CFPB Director Rohit Chopra.[48]

These requirements took effect 18 months ago, and lenders and servicers have been steadily amassing borrower-specific data ever since. Yet despite having previously voiced support for the SCIF data, the Bureau's new proposal seems to completely disregard it. Instead of relying on self-reported

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[46] *See* fn 41.
[47] Fannie Mae/Freddie Mac Form 1103.
[48] FHFA, "FHFA Announces Mandatory Use of the Supplemental Consumer Information Form" (May 3, 2022).

language preference data directly from the borrower, the Bureau now asks servicers to focus on the individual marketing practices of hundreds of lenders. This not only ignores a trove of readily available, reliable information, it calls into question why the SCIF requirement was ever adopted in the first place.

To be clear, we do not advocate that servicers rely on their own SCIF data to make individualized decisions on which languages to support. As previously noted, we believe the best standard is one that's consistent throughout the industry. But whether the Bureau ultimately adopts a uniform standard or individualized one, the SCIF data provides a far more reliable and accessible starting point than individual lender marketing practices.

v. If the Marketing Standard is ultimately adopted, further clarification is required.

Our view is that the Marketing Standard is overbroad, unnecessary, and likely to lead to unintended consequences. We believe the Bureau should therefore abandon it, and instead focus on other, more reliable standards. However, if the Bureau nevertheless moves forward with this standard, the future proposed rule will need to include precise guidance, including a clearer definition of what constitutes "marketing,[49]" with measurable, definitive forms of evidence that would serve as the basis for the "servicer knows or should have known" that a language was used in marketing to the borrower. Additionally, the Bureau will need to clarify what it means by implied or explicit promises that would trigger this obligation. We also ask for universal definitions for "marketing" and "received." For "received," we request that the Bureau identify definitive forms of evidence that would serve as the basis for a customer receipt of marketing materials (i.e., something on a webpage v. a mailer sent directly to an individual customer). Lastly, the rule must clarify that this standard can and will only be applied prospectively. Today, servicers do not have information on how a loan was marketed.

vi. Inconsistencies among servicers will complicate the secondary market for both whole loans and mortgage servicing rights.

The secondary market has long held an outsized role in the mortgage industry. The purchase and sale of both whole loans and servicing rights provides liquidity needed to ensure consumers can readily access affordable home financing. The compliance costs and legal risks involved in adhering to the Marketing Standard likely will have a negative impact on the secondary market. It is possible would-be acquirers may decline to bid on pools entirely or seek to lower their bids to offset any additional compliance costs. This ultimately could reduce capital access and increase costs for future borrowers.

In sum, the entire "marketing" section of the Proposal is overbroad, vague, unworkable, and will very likely lead to less language access for borrowers, an outcome that is inconsistent with the Bureau's intent.

f. *Interpretation services cannot always be in real-time.*

While the Bureau's intent seems to be an immediate hand-off to real-time oral interpretation services, this requirement may not be achievable in some instances. We would recommend alternatively, and expressly stated in the rule or official commentary, that the interpretation services

[49] Although we believe the proposed marketing-related requirements should be removed entirely, if the CFPB chooses to include a marketing-based requirement in its final rule, it will need to clearly define what constitutes marketing. We recommend the CFPB consider the marketing clarification in the Official Commentary to 12 CFR § 1005.31(g)(1), including the examples of communicating in a foreign language for purposes other than to advertise, solicit, or market.

requirement may be satisfied if a servicer provides the borrower with interpretations within a "reasonable amount of time." Examples of meeting those standards should be included in the future proposed official commentary, such as a target callback of less than an hour during normal business hours.

Although HPC members support the use of offering interpretative services, we would also like to note our concern about the capacity of vendors to meet a new industrywide standard. We ask that the Bureau conduct research and outreach with translation vendors to verify that the 18-month implementation timeline for this requirement is workable.

g. *The LEP concepts should not apply to the websites referred to in the specified notices.*

In the preamble, the CFPB states that it is not proposing to apply the LEP-related requirements to the websites referred to in the specified notices. For example, the proposed requirements would apply to the early intervention notice, but not the website listing loss mitigation options that the CFPB is proposing to require servicers to reference in that notice. The CFPB is seeking comment on whether it should make the website subject to these LEP-requirements. If the Bureau is to pursue these LEP concepts in a proposed or final rule, they should not apply to the referenced websites, as the burden of maintaining accuracy with a set of dynamic websites would be costly and presents potential yet significant compliance, fair lending, and reputational risk.

11. The amendments to the appeals process need substantial refinement.

The Proposal "clarifies" that failure to make an accurate loss mitigation determination on a borrower's mortgage loan is a covered error under §1024.35. A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides a loss mitigation determination to the borrower. An appeal that meets the procedural requirements of §1024.35 and is submitted within 14 days of the loss mitigation determination shall be treated as both an appeal *and* an error assertion under §1024.35. Additionally, proposed §1024.41(h)(4) creates special rules for cases where a borrower submits a written notice of error that relies upon the §1024.35(b)(11) catch-all within the 14-day appeal window, after a determination notice is sent. In that case, a servicer may not make the appeal determination until it has either corrected the error or conducted a reasonable investigation and determined that no error occurred. This effectively reduces the 30-business day deadline (with an option for a 15-business day extension) that would otherwise generally apply for responding to a notice of error. The servicer would have to complete the investigation and respond within the 30-calendar day appeal evaluation timeframe so that it can comply with the timing requirements of §1024.41(h)(4).

a. *Interplay of notice of errors and appeals is duplicative and confusing and does not lead to substantial borrower benefit.*

Treating an appeal as both an appeal under §1024.41 and a notice of error under §1024.35 is duplicative and confusing. When the Bureau finalized Regulation X in 2013, the Bureau explained that it believed the appeal process set forth in § 1024.41(h) provides an effective procedural means for borrowers to address issues relating to a servicer's evaluation of a borrower for a loan modification program. "For this reason, and the reasons stated below with respect to loss mitigation practices, the Bureau declines to add a servicer's failure to correctly evaluate a borrower for a loss mitigation option

as a covered error in the final rule."[50] While the Bureau did intend for the catch-all provision of §1024.35(b)(11) to be broad, the Bureau specifically stated that failure to correctly evaluate a borrower for a loss mitigation option is not a covered error. The Bureau has not shown why a change of course in the approach to loss mitigation determinations is needed or why the appeals process is insufficient. Without a substantiated justification for this change, the Bureau should not finalize this provision.

The Bureau has not sufficiently justified combining and overlapping these two provisions. Nor has it given enough guidance on how these provisions would work together. May a servicer send one letter/response to a borrower if both the appeals and notice of error provisions apply? What if the mailbox used for notices of error is not the same mailbox used for appeals? What are a servicer's obligations under §1024.35 for a notice of error regarding a loss mitigation decision when it is submitted after the 14-day time period under §1024.41(h)? The Bureau is silent on these circumstance and guidance is needed. Without additional guidance this process will likely lead to confusion for both borrowers and servicers.

Additionally, by referencing the catch-all in §1024.35(b)(11) and then requiring a servicer to complete the notice of error investigation and response process within the same timeframe as an appeal, the CFPB has created an impractical framework for servicers. A borrower's written notice of error may not have anything to do with loss mitigation and a servicer may reasonably require the full time allotted in section §1024.35 to investigate and respond to the issues raised in the notice of error. A notice of error being submitted within the 14-day appeal window does not justify requiring a shorter amount of time for a servicer to address the inquiry. This framework would also potentially require servicers to analyze the content of a written notice of error and determine which, if any, allegations of servicing errors fall into the §1024.35(b)(11) catch-all and which fall into other enumerated categories.

If the Bureau is to move forward, which we do not believe it should, the Bureau should create a new category under §1024.35(b) specific to loss mitigation determinations, instead of adding to the catch-all category in §1025.35(b)(11). This would help clarify the exact circumstances when the notice of errors and appeals provisions overlap and when they do not.

b. *The appeals process should not apply to loss mitigation offers, only declinations.*

As proposed, it seems the Bureau intends to apply the appeals process to loss mitigation offers, although this is ambiguous. Proposed §1024.41(h)(1) states that "[a] servicer shall permit a borrower to appeal the servicer's determination regarding any loss mitigation option available to the borrower." As written, this provision has no limitations (timing or otherwise) and would appear to apply to any determination made by a servicer to either offer or deny a borrower for an available option. Additionally, proposed §1024.41(h)(2) states that appeals may be filed "within 14 days after the servicer provides a loss mitigation determination to the borrower pursuant to paragraph (c) of" §1024.41. The referenced paragraph (c) contains three determination notice options, with (c)(1) applying when a servicer "makes a determination to offer or deny any loss mitigation assistance." If this structure is

[50] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10744 (Feb. 14, 2013). We note that several courts have determined that errors in loss mitigation determinations are not covered errors under RESPA/Regulation X. *See, e.g.*, Naimoli v. Ocwen Loan Servicing, 22 F.4th 376, 384 (2nd Cir., 2022) ("All parties agree that a loan servicer's failure to properly evaluate a borrower for a loss mitigation option is not a covered error under § 1024.35(b)"); Morgan v. Caliber Home Loans, Inc., 26 F.4th 643, 651 (4th Circ., 2022) ("a loan modification is a contractual issue not a servicing matter…. The only error alleged… is denial of the loan modification…. This does not fall within the ambit of 'servicing' so as to trigger RESPA's protections…").

retained, we do not understand, and the Bureau does not adequately explain, the policy justification for the appeals process applying to loss mitigation *offers,* rather than solely to declinations. We do not see a substantial benefit to borrowers that outweighs the servicer costs involved, and we believe this could be subject to abuse by ill-intentioned individuals working to game the system rather than engage in good faith to achieve a loss mitigation solution.

c. *The interplay with determination notices needs clarification.*

Similar to our comments above regarding the timing and trigger for determination notices, we ask the Bureau to establish a clear appeals policy that would identify that the loss mitigation review cycle concludes once a borrower has been evaluated for all available loss mitigation programs, has been denied for such programs, and the applicable appeal period has expired or the appeal has been exhausted. By placing the appeal period at the end of the loss mitigation review cycle, the Bureau would still protect borrowers' important rights (and make sure that no dual tracking occurs) while avoiding the risk of adding more processes that will almost certainly be abused.

12. Consistent with our comments on the right to appeal, there should not be a right to appeal an unsolicited/blind offer.

Under the Proposed Rule, if a servicer makes an unsolicited loss mitigation offer to a borrower, based solely on information in the servicer's possession, the servicer shall provide the borrower with a written notice stating that determination. The servicer must include in that notice: (1) The amount of time the borrower has to accept or reject an offer of a loss mitigation program; (2) A list of all other loss mitigation programs that remain available to the borrower, if any, including a clear statement describing the next steps the borrower must take to be reviewed for those loss mitigation programs or, if applicable, a statement that the servicer has reviewed the borrower for all available loss mitigation programs and none remain; and (3) The name of the owner/assignee of the loan. The required notice for an unsolicited offer does not include anything related to an appeal, though it appears the CFPB is contemplating that all offers should be appealable.

We appreciate the Bureau is not requiring a determination notice for denials of blind/unsolicited offers, as that would cause borrower confusion without any countervailing benefit. Aligned with our comments elsewhere in this letter regarding the right to appeal, we do not see a substantive borrower benefit to providing a right to appeal a blind/unsolicited offer. We ask that the right of appeal not apply to any loss mitigation offer, including blind/unsolicited offers.

13. Any changes in credit reporting must be consistent with applicable law and the Bureau's authority.

In the preamble, the Bureau explains that it is considering a variety of solutions that could improve the accuracy and consistency of credit reporting information furnished by servicers. These solutions could include adding to or amending CFPB regulations to require that servicers report accurate information or amending furnisher guidance to improve or enhance the guidance on how to report tradeline data. The CFPB is requesting comment about possible approaches.

HPC believes that any limitation on credit reporting must be consistent with existing laws and must be explicit regarding what information may not be included in the credit report. We do not believe that the Bureau has <u>any</u> authority under RESPA to impose credit reporting requirements or prohibitions.

If the Bureau were to consider exercising authority under the Fair Credit Reporting Act or other applicable law, it must undertake a thorough analysis of exactly what information is at issue and the broader implications of restricting the reporting of such information.

14. **The CFPB's cost/benefit analysis is completely inadequate and must be revised and reissued for comment.**

We do not believe the Bureau's cost-benefit analysis of the Proposal fulfills its requirements under section 1022(b) of the CFPA or the APA. As discussed elsewhere in this letter, the CFPB has not sufficiently calculated or addressed the costs involved in implementing and complying with the LEP provisions, the determination notices, the website requirements, and the procedural safeguards to the loss mitigation review cycle. The CFPB states that "it does not have" the data or sufficient information to estimate the costs or benefits of the Proposal 16 times in the 1022(b) analysis. Put plainly, we do not see how the Bureau's 1022(b) analysis meets the requirement that the Bureau consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from" the rule.[51] This is a significant proposal that would have far-reaching impacts on the housing finance system. However, the Bureau does not consider the implications of the Proposal on the secondary market, value of mortgage servicing rights, and availability of a variety of loss mitigation programs – all of which may lead to a potential reduction of access by consumers to mortgage products and services.

Additionally, under the APA, to allow for meaningful opportunity for input by interested parties, the Bureau must reveal for public evaluation any data underlying its analysis. Since the Bureau admittedly does not have the data in multiple instances, it can provide no meaningful opportunity for input. For certain elements of the Proposal, the Bureau must conduct further analysis and data gathering and repropose, with a more robust and complete cost/benefit analysis prior to finalizing the rule.

15. **The CFPB should provide clear transition rules for loss mitigation applications and/or assistance requests that are under review as of the implementation date.**

The Proposal does not provide clear guidance regarding loss mitigation reviews that are in process as of the implementation date of the final rule. We recommend that the final rule apply to requests for loss mitigation assistance received on or after the implementation date of the final rule. Any loss mitigation application that is received prior to the implementation date of the final rule should continue to be subject to the prior rule.

Conclusion

HPC appreciates the Bureau's initiative to reconsider and update Regulation X. As described in this letter, the basic challenge inherent in this exercise is achieving the balance required in the CFPB's enabling statute – that is, to consider "the potential benefits and costs to consumers and covered persons [financial services providers], including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[52] Mortgage servicing rules need to

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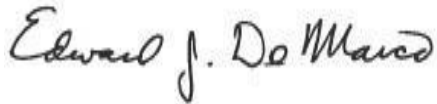
[51] 12 U.S.C. § 5512(b)(2)(A)(i).

give borrowers a meaningful chance to recover and retain homeownership while preserving mortgage investors' ultimate right to repayment and a claim on the property to pay off the mortgage in case of default. HPC believes that the specific suggestions we provide in this letter would bring greater clarity to mortgage servicing while striking this necessary balance. As HPC's members have demonstrated time and again – for borrowers affected by natural disasters, the COVID-19 pandemic, and common forms of financial hardship – mortgage servicers help all borrowers facing difficulties remain in their homes. Enhancing the rules regarding default servicing will benefit troubled borrowers, improve the borrower experience and bring greater certainty to the investors, lenders, and servicers that put their capital at stake in making mortgage loans.

Thank you in advance for your consideration of these comments. We would welcome the opportunity to meet with you to discuss our recommendations and concerns. Please have your staff contact Matt Douglas at matt.douglas@housingpolicycouncil.org with any questions or to arrange further discussion.

Yours truly,



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